CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 497

149 MADISON AVENUE CORP. AND WILLIAMS & CO., INC., PETITIONERS,

vs.

FRANK ASSELTA, CAMILO DEL RIO, JOSEPH McARDLE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 13, 1946.

CERTIORARI GRANTED DECEMBER 9, 1946.

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Defendants' Exhibit:

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* Indicates page of Exhibit Volume at which the exhibit is reproduced.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

FRANK ASSELTA, CAMILO DEL RIO, JOSEPH McARDLE, SAMUEL MANNE, CORNELIUS McCOLE, BURTON PETERSON, FRANK RODRIGUEZ, JAMES TORRA, JOHN H. BERGER and GEORGE BERGER,

Plaintiffs-Appellees,

against

149 MADISON AVENUE CORP. and WILLIAMS & Co., Inc.,

Defendants-Appellants.

Civil 23-461

Statement Under Rule XIII, Subdivision 4.

This action was commenced in the United States District Court for the Southern District of New York by the filing of a complaint on December 10, 1943. The summons and complaint were served on defendants on December 13, 1943. The answer was served on January 25, 1944. The amended answer was served on April 4, 1944. On November 22, 1944, during the trial the amended complaint was filed.

The defendants have not been arrested, nor was bail taken or property attached or arrested.

During the trial the action was discontinued as to George Anderson, who died pending the action. At the trial John H. Berger and George Berger were made parties plaintiff. By stipulation dated March 11, 1946, the action was discontinued on behalf of the plaintiffs Frank Asselta, Joseph McArdle and George Berger.

The action was tried before Judge William Bondy on November 16, 17, 20, 21, 22 and 24, 1944. No question was referred to a Commissioner or Commissioners, Master or Referee.

Judgment was entered on March 8, 1946, in favor of the plaintiffs Camilo Del Rio, Samuel Manne, Cornelius McCole, Burton Peterson, Frank Rodriguez, James Torra and John H. Berger.

By notice of appeal dated March 18, 1946, the defendants appeal from the judgment entered.

5 The plaintiffs appeared originally by Samuel D. Friedman as their attorney. By stipulation dated February 19, 1946, Duberstein & Nimkoff, Esqs., were substituted and now appear as plaintiffs' attorneys. The defendants are represented by Joseph Caine.

There has been no change of parties or attorneys since the commencement of the within action, except as set forth above.

6

Summons.

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

GEORGE ANDERSON, FRANK ASSELTA, CAMILO DEL RIO, JOSEPH MCARDLE, SAMUEL MANNE, CORNELIUS MCCOLE, BURTON PETERSON, FRANK RODRIGUEZ, JAMES TORRA,

Plaintiffs,

v.

149 MADISON AVENUE CORP. and WILLIAMS & CO., Inc.,

Defendants.

Civil-Action File No. 23-461

To the above named Defendants:

You are hereby summoned and required to serve upon Samuel D. Friedman, plaintiffs' atorney, whose address 305 Broadway, Borough of Manhattan, City of New York, an answer to the complaint which is herewith served upon you, within twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

GEORGE J. H. FOLLMER,
Clerk of Court.

Dated: Dec. 10, 1943.

[Seal of Court]

10 **Amended Complaint.**

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Plaintiffs by Samuel D. Friedman, their attorney as and for an amended complaint, complaining of the defendants, allege:

11 FOR A CAUSE OF ACTION IN FAVOR OF GEORGE ANDERSON.

FIRST: Plaintiffs bring this action to recover from defendants unpaid overtime compensation and an additional equal amount as liquidated damages, pursuant to Section 16(b) of the Fair Labor Standards Act of 1938 (Pub. No. 718, 75th Cong.; 62 Stat. 1060), hereinafter referred to as the Act.

SECOND: Jurisdiction is conferred on this Court by Section 41 (8), 28 U.S.C. (Judicial Code) 24, giving the District Court original jurisdiction "of all suits and proceedings arising under any law regulating commerce," without regard to the citizenship of the parties
12 or the sum or value in controversy, and by Section 16 (b) of the Act. The Act has been in effect since October 24, 1938.

THIRD: At all times herein mentioned defendant 149 Madison Avenue Corp. has been a corporation organized under and existing by virtue of the laws of the State of New York, having its principal place of business at 149 Madison Avenue, in the City, County and State of New York, within the jurisdiction of this Court.

FOURTH: That at all times herein mentioned defendant Williams & Co., Inc., has been a corporation organ-

ized under and existing by virtue of the laws of the State of New York, having its principal place of business at 1178 Broadway in the City, County and State of New York, within the jurisdiction of this Court.

FIFTH: At all times herein mentioned defendant 149 Madison Avenue Corp. has been the owner of and in control of a 12 story and basement loft building located at 149 Madison Avenue, New York, N. Y.

SIXTH: At all times herein mentioned defendant Williams & Co., Inc., has acted as the agent of and for the account of the defendant 149 Madison Avenue Corp., in the management and operation of the building, has had authority to hire and fire employees engaged in the operation and maintenance of the building, and has issued instructions to and otherwise controlled, directed and supervised the employees in the performance of their duties; in so doing the agent, Williams & Co., Inc., has acted at all times in the interest of the defendant 149 Madison Avenue Corp., in relation to such employees.

SEVENTH: At all times herein mentioned space in the said building has been leased by defendants to and occupied by approximately 20 tenants, of which approximately 17 have been engaged in the production, sale and distribution of wearing apparel, laces, draperies, leather goods, carpets, rugs and magazines, approximately 2 have been engaged in the purchase, sale and distribution of ticking, upholstery and other materials and supplies at wholesale to manufacturers, wholesalers and contractors, and 1 has been engaged in the advertising business distributing advertising in newspapers throughout the States.

EIGHTH: At all times herein mentioned substantially all of the materials from which goods have been produced by tenants engaged in the production, sale and distribution of wearing apparel, laces, draperies, leather goods,

carpets, rugs and magazines have been purchased, transported and received in interstate commerce from points in various States other than the State of New York, and substantially all of the goods purchased, produced, sold or distributed by such tenants have been produced for interstate commerce and have been subsequent to the work performed upon them, sold, shipped, transported, distributed and delivered in interstate commerce from the building to points in various States other than the State of New York. At all times herein mentioned substantial quantities of ticking, upholstery and other materials, commodities and supplies distributed in the building by tenants engaged in the sale and distribution of such materials have been purchased, transported and received in interstate commerce from points in various states other than the State of New York, and substantial quantities of such goods have been sold, shipped, transported, distributed and delivered in interstate commerce in and from the building to points in various states other than the State of New York. With few exceptions, substantially all of the tenants in the building have thus been regularly and continuously engaged there in trade, commerce and transportation between the several states of the United States and in the production of goods for distribution among the several states of the United States.

NINTH: At all times herein mentioned a substantial number of tenants in the building have been regularly and continuously engaged there in the use of the mails, telephone, telegraph and other instrumentalities of interstate commerce to communicate between offices in the building and various points outside of the State of New York. A substantial number of tenants have thus regularly and continuously engaged in the building in interstate transmission and communication.

TENTH: Since October 24, 1938, defendants have employed an average of approximately 10 employees, including plaintiffs, as building maintenance and operating employees, in such capacities as elevator operators, watchmen, engineers, firemen, mechanics, electricians, porters and handymen in the maintenance and operation of the building and of the facilities of the building. These employees have at all times performed the customary duties of persons charged with the effective maintenance of a loft and manufacturing building, including the furnishing of heat and hot water; the keeping of elevator, radiator, water and fire sprinkler systems in repair; the maintenance of electric light and power systems and appliances; the operation of elevators carrying tenants and employees, customers and clients of tenants, and other passengers, as well as raw materials and other goods coming to and finished garments and other products going from tenant's premises; protection of the building and tenant's quarters and property from theft, fire and other damage; repair of hallways, stairways and other common parts of the building; and the keeping of the building and tenant's quarters in a clean and habitable condition. 20

ELEVENTH: In performing their duties the said employees, including plaintiffs, have been engaged in operations, processes and duties closely, immediately, and essentially related to interstate commerce, trade, transportation, transmission and communication carried on in the building by the various tenants, and in occupations and processes necessary to the preparation, handling, distributing and production for interstate commerce of various goods, articles and materials and commodities by the tenants in the building. 21

TWELFTH: Between October 24, 1938, and the present date, defendants employed plaintiffs as building maintenance and operating employees, engaged in inter-

state commerce, and during the period between October 24, 1938, and the present date defendants have employed various other building maintenance and operating employees similarly situated to plaintiffs in interstate commerce and in the production of goods for interstate commerce, for work weeks longer than the applicable maximum number of weeks prevailing under Section 7 of the Act (44 hours per week between October 24, 1938, and October 24, 1939; 42 hours per week between October 24, 1939, and October 24, 1940; and 40 hours per week subsequent to October 24, 1940) and defendants failed and refused to compensate plaintiffs and such other employees for such employment in excess of the applicable maximum in such work weeks at rates not less than one and one-half times the regular rates at which they have been employed. The employment of plaintiffs for work weeks in excess of the applicable maximum prevailing under Section 7 of the Act without compensating them for such excess at rates not less than one and one-half times the regular rates at which they have been employed was in violation of Section 7 of the Act.

THIRTEENTH: Between October 24, 1938, and the present date defendants employed plaintiff, George Anderson, as an elevator operator and as such employee he was engaged in interstate commerce and in the production of goods for interstate commerce, for work weeks in excess of the hours of the applicable maximum hours established by Section 7 of the Act without being compensated for such excess at rates not less than one and one-half times the regular rate at which he was employed by the defendants during said period, which was in violation of Section 7 of the Act, That these defendants failed and refused to compensate said plaintiff for said excess hours established by said Act.

FOURTEENTH: That plaintiff George Anderson made complaint to the Wage and Hour Division under the provisions of the Fair Labor Standards Act of 1938, who, upon investigation, computed the amount of unpaid overtime compensation to which he was entitled for the period terminating on April 20, 1942, as $188.08. Payment of this sum was subsequently made but these defendants have failed and refused to pay the liquidated damages in an equal amount of $188.08 pursuant to said Act and in violation thereof. That said plaintiff was damaged thereby in the sum of $188.08, and, in addition thereto, to the extent of such sums which have become due and payable under both Sections 7 and 16 (b) of the Fair Labor Standards Act of 1938 between the time covered by the computation made by the Wage and Hour Division and the service of the complaint.

FOR A CAUSE OF ACTION IN FAVOR OF FRANK ASSELTA

FIFTEENTH: Plaintiff Frant Asselta, repeats and realleges paragraphs First to Twelth, inclusive, with the same force and effect as though incorporated herein.

SIXTEENTH: Between October 24, 1938, and the present date defendants employed plaintiff Frank Asselta as a watchman and elevator operator and as such employee he was engaged in interstate commerce and in the production of goods for commerce, for work weeks in excess of the hours of the applicable maximum hours established by Section 7 of the Act without being compensated for such excess at rates not less than one and one-half times the regular rate at which he was employed by the defendants during said period, which was in violation of Section 7 of the Act. That these defendants failed and refused to compensate said plaintiff for said excess hours established by said Act.

SEVENTEENTH: That plaintiff Frank Asselta made complaint to the Wage and Hour Division under the provisions of the Fair Labor Standards Act of 1938, who, upon investigation computed the amount of unpaid overtime compensation to which he was entitled for the period terminating on April 20, 1942, as $465.29. Payment of this sum was subsequently made but defendants have failed and refused to pay the liquidated damages in an equal amount of $465.29 pursuant to said Act and in violation thereof. That said plaintiff was damaged thereby in the sum of $465.29, and, in addition thereto, to the extent of such sums which have become due and payable under both Sections 7 and 16 (b) of the Fair Labor Standards Act of 1938 between the time covered by the computation made by the Wage and Hour Division and the service of the complaint.

FOR A CAUSE OF ACTION IN FAVOR OF CAMILO DEL RIO

EIGHTEENTH: Plaintiff Camilo Del Rio repeats and realleges paragraphs First to Twelfth, inclusive, with the same force and effect as though fully incorporated herein.

NINETEENTH: Between October 24, 1938, and the present date defendants employed plaintiff Camilo Del Rio as an elevator operator and as such employee he was engaged in interstate commerce and in the production of goods for interstate commerce, for work weeks in excess of the hours of the applicable maximum hours established by Section 7 of the Act without being compensated for such excess at rates not less than one and one-half times the regular rate at which he was employed by the defendants during said period which was in violation of Section 7 of the Act. That these defendants failed and refused to compensate said plaintiff for said excess hours established by said Act.

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TWENTIETH: That plaintiff Camilo Del Rio made complaint to the Wage and Hour Division under the provisions of the Fair Labor Standards Act of 1938 who, upon investigation computed the amount of unpaid overtime compensation to which he was entitled for the period terminating April 20, 1942, as $211.35. Payment of this sum was subsequently made but defendants have failed and refused to pay the liquidated damages in additional equal amount of $211.35 pursuant to said Act and in violation thereof. That he was damaged thereby in the sum of $211.35, and, in addition thereto, to the extent of such sums which have become due and payable under both Sections 7 and 16 (b) of the Fair Labor Standards Act of 1938 between the time covered by the computation made by the Wage and Hour Division and the service of the complaint.

32

FOR A CAUSE OF ACTION IN FAVOR OF JOSEPH MCARDLE

TWENTY-ONE: Plaintiff Joseph McArdle repeats and realleges paragraphs First to Twelfth, inclusive, with the same force and effect as though fully incorporated herein.

33

TWENTY-TWO: Between October 24, 1938, and the present date defendants employed plaintiff Joseph McArdle as an elevator operator and as such employee he was engaged in interstate commerce and in the production of goods for interstate commerce, for work weeks in excess of the hours of the applicable maximum hours established by Section 7 of the Act without being compensated for such excess at rates not less than one and one-half times the regular rate at which he was employed by the defendants during said period, which was in violation of Section 7 of the Act. That these defendants failed and refused to compensate said plaintiff for said excess hours established by said Act.

34 TWENTY-THREE: That plaintiff Joseph McArdle made complaint to the Wage and Hour Division under the provisions of the Fair Labor Standards Act of 1938, who, upon investigation computed the amount of unpaid overtime compensation to which he was entitled for the period terminating on April 20, 1942, at $151.39. Payment of this sum was subsequently made but defendants have failed and refused to pay the liquidated damages in an additional equal amount of $151.39 pursuant to said Act and in violation thereof. That he was damaged thereby in the sum of $151.39, and, in addition thereto, to the 35 extent of such sums which have become due and payable under both Sections 7 and 16 (b) of the Fair Labor Standards Act of 1938 between the time covered by the computation made by the Wage and Hour Division and the service of the complaint.

FOR A CAUSE OF ACTION IN FAVOR OF SAMUEL MANNE

TWENTY-FOUR: Plaintiff Samuel Manne repeats and realleges paragraphs First to Twelfth, inclusive, with the same force and effect as though fully incorporated herein.

36 TWENTY-FIVE: Between October 24, 1938, and the present date defendants employed plaintiff Samuel Manne as an elevator operator and as such employee he was engaged in interstate commerce and in the production of goods for interstate commerce, for work weeks in excess of the hours of the applicable maximum hours established by Section 7 of the Act without being compensated for such excess at rates not less than one and one-half times the regular rate at which he was employed by the defendants during said period, which was in violation of Section 7 of the Act. That these defendants failed and refused to compensate said plaintiff for said excess hours established by said Act.

TWENTY-SIX: That plaintiff Samuel Manne made complaint to the Wage and Hour Division under the provisions of the Fair Labor Standards Act of 1938 who upon investigation computed the amount of unpaid overtime compensation to which he was entitled for the period terminating April 20, 1942, as $197.98. Payment of this sum was subsequently made but defendants have failed and refused to pay the liquidated damages in an additional equal amount of $197.98 pursuant to said Act and in violation thereof. That he was damaged thereby in the sum of $197.98, and, in addition thereto, to the extent 38
of such sums which have become due and payable under both Sections 7 and 16 (b) of the Fair Labor Standards Act of 1938 between the time covered by the computation made by the Wage and Hour Division and the service of the complaint.

FOR A CAUSE OF ACTION IN FAVOR OF CORNELIUS MCCOLE

TWENTY-SEVEN: Plaintiff Cornelius McCole repeats and realleges paragraphs First to Twelfth, inclusive, with the same force and effect as though fully incorporated herein.

TWENTY-EIGHT: Between October 24, 1938, and the 39
present date defendants employed Cornelius McCole, plaintiff, as a watchman, elevator operator and porter and as such employee he was engaged in interstate commerce and in the production of goods for interstate commerce, for work weeks in excess of the hours of the applicable maximum hours established by Section 7 of the Act without being compensated for such excess at rates not less than one and one-half times the regular rate at which he was employed by the defendants during said period, which was in violation of Section 7 of the Act. That these defendants failed and refused to compensate said plaintiff for said excess hours established by said Act.

40 TWENTY-NINE: That plaintiff Cornelius McCole made complaint to the Wage and Hour Division under the provisions of the Fair Labor Standards Act of 1938 who upon investigation computed the amount of unpaid overtime compensation to which he was entitled for the period terminating on April 20, 1942, as $234.99. Payment of this sum was subsequently made but the defendants have failed and refused to pay the liquidated damages in an additional equal amount of $234.99 pursuant to said Act and in violation thereof. That he was damaged thereby in the sum of $234.99, and, in addition
41 thereto, to the extent of such sums which have become due and payable under both Sections 7 and 16 (b) of the Fair Labor Standards Act of 1938 between the time covered by the computation made by the Wage and Hour Division and the service of the complaint.

FOR A CAUSE OF ACTION IN FAVOR OF BURTON PETERSON

THIRTY: Plaintiff Burton Peterson repeats and realleges paragraphs First to Twelfth, inclusive, with the same force and effect as though fully incorporated herein.

42 THIRTY-ONE: Between October 24, 1938, and the present date defendants employed plaintiff Burton Peterson as an elevator operator and as such employee he was engaged in interstate commerce and in the production of goods for interstate commerce, for work weeks in excess of the hours of the applicable maximum hours established by Section 7 of the Act without being compensated for such excess at rates not less than one and one-half times the regular rate at which he was employed by the defendants during said period, which was in violation of Section 7 of the Act. That these defendants failed and refused to compensate said plaintiff for said excess hours established by said Act.

THIRTY-TWO: That plaintiff Burton Peterson made complaint to the Wage and Hour Division under the provisions of the Fair Labor Standards Act of 1938 who upon investigation computed the amount of unpaid overtime compensation to which he was entitled for the period terminating on April 20, 1942, as $203.80. Payment of this sum was subsequently made but defendants have failed and refused to pay the liquidated damages in an additional equal amount of $203.80 pursuant to said Act and in violation thereof. That he was damaged thereby in the sum of $203.80, and, in addition thereto, to the extent of such sums which have become due and payable under both Sections 7 and 16(b) of the Fair Labor Standards Act of 1938 between the time covered by the computation made by the Wage and Hour Division and the service of the complaint.

FOR A CAUSE OF ACTION IN FAVOR OF FRANK RODRIGUEZ

THIRTY-THREE: Plaintiff Frank Rodrigues repeats and realleges paragraphs First to Twelfth, inclusive, with the same force and effect as though fully incorporated herein.

THIRTY-FOUR: Between October 24, 1938, and the present date defendants employed plaintiff Frank Rodriguez as a fireman and as such employee he was engaged in interstate commerce and in the production of goods for interstate commerce, for work weeks in excess of the hours of the applicable maximum hours established by Section 7 of the Act without being compensated for such excess at rates not less than one and one-half times the regular rate at which he was employed by the defendants during the said period, which was in violation of Section 7 of the Act. That these defendants failed and refused to compensate said plaintiff for said excess hours established by said Act.

46 THIRTY-FIVE: That plaintiff Frank Rodriguez made complaint to the Wage and Hour Division under the provisions of the Fair Labor Standards Act of 1938, who upon investigation, computed the amount of unpaid overtime compensation to which he was entitled for the period terminating on April 20, 1942, as $78.43. Payment of this sum was subsequently made, but the defendants have failed and refused to pay the liquidated damages in an additional equal amount of $78.43 pursuant to said Act and in violation thereof. That he was damaged
47 thereby in the sum of $78.43, and, in addition thereto, to the extent of such sums which have become due and payable under both Sections 7 and 16 (b) of the Fair Labor Standards Act of 1938 between the time covered by the computation made by the Wage and Hour Division and the service of the complaint.

FOR A CAUSE OF ACTION IN FAVOR OF JAMES TORRA

THIRTY-SIX: Plaintiff James Torra repeats and realleges paragraphs First to Twelfth, inclusive, with the same force and effect as though fully incorporated herein.

48 THIRTY-SEVEN: Between October 24, 1938, and the present date defendants employed plaintiff James Torra as a handyman, elevator operator and repairman and as such employee he was engaged in interstate commerce and in the productions of goods for interstate commerce, for work weeks in excess of the hours of the applicable maximum hours established by Section 7 of the Act without being compensated for such excess at rates not less than one and one-half times the regular rate at which he was employed by the defendants during said period, which was in violation of Section 7 of the Act. That these defendants failed and refused to compensate said plaintiff for said excess hours established by said Act.

THIRTY-EIGHT: That plaintiff James Torra made complaint to the Wage and Hour Division under the provisions of the Fair Labor Standards Act of 1938, who upon investigation, computed the amount of unpaid overtime compensation to which he was entitled for the period terminating on April 20, 1942, as $249.31. Payment of this sum was subsequently made, but the defendants have failed and refused to pay the liquidated damages in an additional equal amount of $249.31, pursuant to said Act and in violation thereof. That he was damaged thereby in the sum of $249.31, and, in addition thereto, 50
to the extent of such sums which have become due and payable under both Sections 7 and 16(b) of the Fair Labor Standards Act of 1938 between the time covered by the computation made by the Wage and Hour Division and the service of the complaint.

WHEREFORE, plaintiffs pray that judgment be awarded them for liquidated damages as follows:

GEORGE ANDERSON	$188.08
FRANK ASSELTA	465.29
CAMILO DEL RIO	211.35
JOSEPH MCARDLE	151.39
SAMUEL MANNE	197.98
CORNELIUS MCCOLE	234.99
BURTON PETERSON	203.80
FRANK RODRIGUEZ	78.43
JAMES TORRA	249.31

51

and plaintiffs further pray that the Court allow a judgment for such additional amounts as are due to each of them under Sections 7 and 16 (b) of the Fair Labor Standards Act of 1938 since the period covered by the computation of the Wage and Hour Division, together

52 with reasonable attorney's fees and the costs and disbursements of this action.

SAMUEL D. FRIEDMAN
Attorney for Plaintiffs
Office and P. O. Address
305 Broadway
Borough of Manhattan
City of New York

NOTE: During the trial this complaint was amended
53 to include causes of action on behalf of John H. Berger and George Berger.

54

Amended Answer.

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Defendants, by Joseph Caine, their attorney, for their amended answer to the complaint, allege:

ANSWERING THE CAUSE OF ACTION OF GEORGE ANDERSON:

1. Admit the allegations contained in paragraph numbered "Fifth" of the complaint, excepting that the defendants deny that the building located at 149 Madison Avenue, New York City, is a loft building.

2. Deny any knowledge or information sufficient to form any belief as to the allegations contained in paragraph numbered "Seventh" of the complaint, excepting that the defendants admit that they leased space to certain tenants in said building.

3. Deny any knowledge or information sufficient to form any belief as to the allegations contained in paragraphs numbered "Eighth" and "Ninth" of the complaint.

4. Deny each and every allegation contained in paragraph numbered "Tenth" of the complaint, excepting that the defendants admit the employment of the plaintiffs in the several capacities of building service and maintenance employees and excepting further that the defendants admit that each of the plaintiff was engaged in the customary duties of the work for which he was hired.

5. Deny each and every allegation contained in paragraphs numbered "Eleventh," "Twelfth," "Thirteenth"

and "Fourteenth" of the complaint, excepting that the defendants admit payment to the plaintiff of the sum of $188.08.

ANSWERING THE CAUSE OF ACTION OF FRANK ASSELTA:

6. Deny each and every allegation contained in paragraph numbered "Sixteenth" of the complaint, excepting that it is admitted that the plaintiff, Asselta, was employed by the defendants as an elevator operator and watchman.

7. Deny each and every allegation contained in paragraph numbered "Seventeenth" of the complaint, excepting that the defendants admit the payment to the plaintiff of the sum of $455.29.

ANSWERING THE CAUSE OF ACTION OF CAMILO DEL RIO:

8. Deny each and every allegation contained in paragraphs numbered "Nineteenth" and "Twentieth" of the complaint, excepting that defendants admit the employment of the plaintiff, Del Rio, as an elevator operator and the payment to him of $211.35.

ANSWERING THE CAUSE OF ACTION OF JOSEPH MCARDLE:

9. Deny each and every allegation contained in paragraphs numbered "Twenty-Second" and "Twenty-Third" of the complaint, excepting that the defendants admit the employment of the plaintiff, McArdle, as an elevator operator and that he was paid the sum of $139.00.

ANSWERING THE CAUSE OF ACTION OF SAMUEL MANNE:

10. Deny each and every allegation contained in paragraphs numbered "Twenty-Fifth" and "Twenty-Sixth"

of the complaint, excepting that the defendants admit the employment of plaintiff, Manne, as an elevator operator and the payment to him of $197.98.

ANSWERING THE CAUSE OF ACTION OF CORNELIUS MCCOLE:

11. Deny each and every allegation contained in paragraphs numbered "Twenty-Eighth" and "Twenty-Ninth" of the complaint, excepting that the defendants admit the employment of McCole at different times during the period complained of as a watchman, elevator operator or 62
porter and that he received $234.99 from the defendants.

ANSWERING THE CAUSE OF ACTION OF BURTON PETERSON:

12. Deny each and every allegation contained in paragraphs numbered "Thirty-First" and "Thirty-Second" of the complaint, excepting that the defendants admit the employment of the plaintiff as an elevator operator and that he was paid $203.80.

ANSWERING THE CAUSE OF ACTION OF FRANK RODRIGUEZ:

13. Deny each and every allegation contained in para- 63
graphs numbered "Thirty-Fourth" and "Thirty-Fifth" of the complaint, excepting that it is admitted that defendants employed plaintiff, Rodriguez, as a fireman and that he was paid the sum of $78.43.

ANSWERING THE CAUSE OF ACTION OF JAMES TORRA:

14. Deny each and every allegation contained in paragraphs numbered "Thirty-Seventh" and "Thirty-Eighth" of the complaint, excepting that it is admitted that Torra worked for the defendants as a part time elevator man and part time repairman and that he was paid the sum of $249.31.

64 *Amended Answer*

FOR A FIRST SEPARATE AND DISTINCT DEFENSE AND AS A SET-OFF, DEFENDANTS ALLEGE:

15. That on or about October 8th, 1942, the defendants voluntarily paid to each of the plaintiffs the amounts admitted in their respective causes of action.

16. That such payment constituted payment in full for all overtime hours worked by the plaintiff during the period of time complained of.

65 17. That such payment followed a computation of the total number of hours worked by each of the plaintiffs in excess of the statutory maximum and for which they might be entitled to claim overtime compensation; that at the time such payment was made, there was a genuine dispute between the parties regarding the facts surrounding the employment by the defendants of the plaintiffs, more particularly, regarding the number of tenants, if any, in the premises which were engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act; regarding the proportion of such tenants compared to all of the tenants in the building; regarding the proportion of space occupied by such
66 tenants as compared with the proportion of those tenants who were not engaged in any production whatsoever; regarding the activities of each of the tenants; regarding the activities of the plaintiffs themselves in relation to the tenants and whether such activities were or were not closely connected with the production of goods in said premises, or a part thereof.

18. That because of the existence of such genuine disputes between the parties, they agreed to and did settle and compromise their differences, negotiating at arm's length without mistake, fraud, misrepresentation or overreaching on the part of anyone against the other, and that following such accord, the claims of the plaintiffs were

satisfied by payment to each plaintiff of the full amount found due him as overtime compensation, and that such amounts were paid to each of the plaintiffs by the defendants and received by each of the plaintiffs in full satisfaction of the entire claim of each of the plaintiffs for overtime compensation, and other claims of whatever nature, from the defendants; that in evidence of the settlement, each of the plaintiffs executed and delivered to the defendants, releases and that accordingly, such accord and satisfaction and releases given in each instance are a complete bar to any recovery by the plaintiffs herein.

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FOR A SECOND SEPARATE AND DISTINCT DEFENSE, DEFENDANTS ALLEGE:

19. That the plaintiffs' activities or employment in behalf of the defendants at their premises, 149 Madison Avenue, New York City, was neither actually in intertsate commerce or so closely related to the movement of goods in interstate commerce as to be part of it and that, accordingly, each of the plaintiffs herein comes outside of the protection and coverage of the Act and is not entitled to recover thereupon.

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FOR A THIRD SEPARATE AND DISTINCT DEFENSE, DEFENDANTS ALLEGE:

20. That the claim of each of the plaintiffs for liquidated damages made more than a year after the payment of the overtime compensation claim of each of them is made unreasonably and unduly late and that the laches of each of the plaintiffs in making such claim should bar them from recovery herein, the defendants having irretrievably and irreparably changed their position to their damage by reason of such payments and by reason of the plaintiffs' present claims.

70 *Amended Answer*

FOR A FOURTH SEPARATE AND DISTINCT DEFENSE, DEFENDANTS ALLEGE:

21. That the plaintiffs, having accepted the full amount of overtime due them more than a year prior to the commencement of this action for liquidated damages, and having accepted such amounts prior to the commencement of action therefor, are and should be estopped from any and all claims for liquidated damages by reason of their failure to assert such claim at the time of the payment of
71 overtime to them and by reason of their delay and neglect in making such claims for more than one year after payment to them of the overtime compensation.

WHEREFORE, defendants pray for judgment dismissing the complaints of each of the plaintiffs herein, together with the costs and disbursements of the action.

JOSEPH CAINE
Attorney for Defendants
Office & P. O. Address
1178 Broadway
Borough of Manhattan
City of New York

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Testimony.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Before: Hon. William Bondy, District Judge.

New York, November 16, 1944, 10:30 A. M.

Appearances:

Samuel D. Friedman, Esq., Attorney for Plaintiffs; Frederick E. Weinberg, Esq., of Counsel.

Joseph Caine, Esq., Attorney for Defendants; Joseph Caine, Esq., and Moses M. Cohen, Esq., of Counsel.

Motion to Amend Complaint.

Mr. Weinberg: Your Honor, I have a motion with respect to the complaint. Shall I make it now?

The Court: I will know more about it after I read the pleadings.

Mr. Weinberg: All right, sir, certainly.

The Court: Are all the allegations in the separate causes of action the same?

Mr. Weinberg: Yes, they are the same. They are repeated.

The Court: I needn't read them. They are the same?

Mr. Weinberg: They are identical.

The Court: Now I am prepared to hear you.

Mr. Weinberg: May it please the Court, the plaintiffs move at this time to amend. I desire to amend the complaint in two respects, your Honor. The first proposed amendment is to add two new employees as plaintiffs. The names of the employees to be added and included therein

are John H. Berger and George Berger. They are respective superintendents and repairmen—or rather each one is engaged both as superintendent and repairman.

The Court: What are their names?

Mr. Weinberg: John H. Berger and George Berger. They are both engaged in duties which include that of superintendent and repair work on the premises.

The Court: Both the same?

Mr. Weinberg: Yes, each of them includes both.

The Court: Are they related?

Mr. Weinberg: They are brothers. Each of them includes duties both as superintendent and repairman and handyman. The amounts for which they are suing are not the same for reasons that my next proposed amendment will exhibit.

My next amendment to the complaint—and in order that it may be intelligible, I will have to consider for a moment the complaint as it now stands. The complaint seeks recovery for moneys due down to the date of the service of the complaint itself. It seeks it for that period with respect to each of the plaintiff employees. Nevertheless in each of the causes of action as the complaint now stands, there is an admission to the effect that the extra time and a half for overtime hours rendered due under Section 7 of the Fair Labor Standards Act of 1938, was paid to each of the plaintiffs on October 8, 1942, or thereabouts, so that the only amounts still due would be the liquidated damages provisions or amounts under Section 16(b) of the Act.

On December 6th the Supreme Court of the United States in the case of Walling v. Helmerich & Payne, rendered a decision upon the basis of which we believe that the amounts paid to each of the plaintiffs since October 8, 1942, were not a proper discharge of the duties of these defendants under Section 7 of the Act.

The Court: Well, why not? In other words, it was less. How was the money computed?

Mr. Weinberg: The money was computed—of course I am anticipating the evidence but I will state it, your Honor —the money was computed by a fictitious device used to compute the regular hourly rate in such a manner that no additional payments would be made.

The Court: I know what you mean.

Mr. Weinberg: Now in view of that case and in view of the fact that we are not extending the period for which we ask money but merely complaining that what we had thought to have been fully paid under Section 7 we realize now under the recent decision was not fully paid; that by a trick the obligation was evaded; and I wish to amend the complaint so as to include additional amounts under Section 7 as well as under 16(b), and also in the respect that the period should be—which I understand this Court allows—extended down to the date of the trial.

The Court: Are they still working?

Mr. Weinberg: Yes, your Honor.

Mr. Cohen: If your Honor please, as regards the first amendment, I have no objection excepting that these—

The Court: Just let me ask a question. Do you oppose the amendment?

Mr. Cohen: I do not oppose it excepting for this condition which exists: there is now pending in the Municipal Court of the City of New York in one of the District Courts, two separate actions by these two individuals which set forth these particular causes of action. Now, I would say in the ordinary and regular course of litigation those two actions should have been discontinued and permission to come into this Court granted.

The Court: Are you willing to discontinue the others?

Mr. Weinberg: Certainly, your Honor. That will of course be done.

The Court: Is that the only objection?

Mr. Cohen: That is the only objection.

Mr. Weinberg: That will be done immediately.

The Court: Yes, on the condition that those two Municipal Court actions will be discontinued, then with the consent of the defendant the amendment is allowed.

Mr. Weinberg: I assume the discontinuance will be without costs, and it will be done immediately.

The Court: Have you got an amended complaint there as to these causes of action?

Mr. Weinberg: No. I will have one prepared in the office, but I might anticipate by saying that the cause of action for each man is a facsimile of the other, and it will be identical with those presently in the complaint. I assume the same answer and the same defenses will be made to those two.

The Court: Now, you move—

Mr. Cohen: I move the same defenses be permitted.

The Court: —the same defenses shall apply to these two new causes of action.

Mr. Weinberg: Of course.

Mr. Cohen: With respect to the second proposed amendment to the complaint, I have to urge seriously, your Honor, that I cannot possibly be ready to undertake a defense which is urged upon me or forced upon me rather to do for the first time following a decision of the Supreme Court that occurred or came down only last week which brings into this case issues that are entirely new. The issue that your Honor will have to determine in passing on this new question is whether or not a certain so-called Meyer agreement between the representatives of the employer, the Realty Advisory Board, and representatives of the plaintiffs, the union, Local 32(b)—whether that agreement is of sufficient strength and propriety to overcome the provisions of the Act or to meet, rather, the provisions of the Act.

The Court: Isn't it true that under the Act or the de-

cisions under it, the amount due an employee in any possible way?

Mr. Cohen: No, Judge; that is not the question. The question is not whether we have paid them the amounts fully including liquidated damages. The question here is that after April 2nd or 15th of 1942 there was an agreement entered into between the parties hereto by their union and representatives of the employer—

The Court: Properly entered into.

Mr. Cohen: —properly entered into under the negotiations of the Mayor, I believe, of the City of New York.

The Court: And the question is, what is the legal effect?

Mr. Cohen: The question is whether a formula was entered into or arrived at by those contracting parties which adequately met the requirements of the Act so that these employees could be paid at so much per hour for 40 hours, and so much thereafter for the six hours beyond forty that they still had to work.

* * * * * *

Mr. Weinberg: Suppose we try the case for the cause of action simply bringing it down to the date of the service of the complaint and on Monday I furnish your Honor with a memorandum of your power to bring it down further. At the moment I will be limited to the date of the service of the complaint subject to the authority then to be furnished, so there is no question about that.

The Court: I think I will take the case, I will hear the evidence and determine this question of amendment as we go along.

Mr. Weinberg: 10:30 Monday, your Honor.

The Court: 10:30, yes. In other words, I will reserve my decision on that, and on the opposition to it till I hear the case. I think the case can be prepared and the workmen ought to get what under the law they are entitled to and their employer ought to be willing to pay

88 *Motion to Amend Complaint*

them what they are entitled to. If they are not entitled to anything the employer should not be required to pay them anything. If they are entitled to more, the employer should pay it.

* * * * * *

New York, November 20, 1944;
10:30 o'clock A. M.

89 Trial resumed.

Appearances:

Samuel D. Friedman, Esq., Attorney for Plaintiff; Frederick E. Weinberg, Esq., of Counsel.

Joseph Caine, Esq., Attorney for Defendant, 149 Madison Avenue Corporation; Moses M. Cohen, Esq., of Counsel.

McLanahan, Merritt & Ingraham, Esqrs., Attorneys for Defendant Williams & Co., Inc.; Robert R. Bruce, Esq., of Counsel.

90 Mr. Weinberg: Shall I put my first witness on the stand?

The Court: No; weren't there some motions to amend?

Mr. Weinberg: Oh, I see. Then I will restate my motion to conform—

The Court: Why do you want to restate it?

Mr. Weinberg: I want to limit the scope of time of the motion to bring it down to the service of the complaint in order to avoid a difficulty.

The Court: Can't be any question that you can't go beyond that.

Mr. Weinberg: I will confine my motion to that ambit, Judge.

The Court: Make your motion. You withdraw all the other motions?

Mr. Weinberg: Yes, I will withdraw to keep the record clear.

The Court: You are withdrawing all motions.

Mr. Weinberg: The motion is to amend paragraph 14th of the complaint and the corresponding paragraphs in each of the successive causes of action on behalf of the other plaintiffs to delete therefrom so much of the allegations as imply a complete payment under Section 7 of the Act so as to be relieved of the admission of a complete payment so that the plaintiffs severally are suing for what is due them under Section 7 between the date covered by the payments referred to in the preceding paragraphs and the date of the service of the complaint. In other words, to have paragraph 14th and its parallel paragraphs would be seeking recovery both under Section 7 and under 16(b). Since those paragraphs are followed by admissions of complete payments under Section 7 and since the Supreme Court has recently indicated that it was not a complete payment I want to sue under Section 7, too.

Mr. Weinberg: I refer your Honor to paragraph 13th of the complaint. May I speak with reference to that while that is in front of you, Judge? 93

The Court: Tell me exactly what you want. I asked you to let me have in writing the amendment that you proposed.

Mr. Weinberg: Well, since I will do it may I state again on the record and if your Honor requires it I can have it written into the record, but I will state it very precisely.

Paragraphs 13th, 16th, 19th, 22nd, 25th, 28th, 31st, 34th and 37th—

The Court: Those are the similar allegations to 13th and 14th?

Mr. Weinberg: Well, those are the ones that are similar to 13th. As to each of those, if your Honor please, I will say it precisely and very shortly. Each of those paragraphs demand judgment—

Mr. Weinberg: Then I want to amend the ones that follow; I want to amend 14th—

The Court: You are not moving to amend 13?

Mr. Weinberg: No; those are the ones I was referring to in my argument. I don't want to amend those. I want to amend 14th, 17th, 20th, 23rd, 26th, 29th, 32nd, 35th and 38th, and I am reading from a notice served on Friday upon the attorneys for the defendants by transforming the period at the end of each of those paragraphs—by changing the periods at the end of each of those paragraphs and by putting commas in and inserting after each such comma in each such paragraph the following language, to wit: "and in addition thereto to the extent of such sums which have become due and payable under both Sections 7 and 16(b) of the Fair Labor Standards Act of 1938 between the end of the period covered by the aforesaid payment made with the Wage and Hour Division and the service of the complaint in this action."

The Court: Is there any objection to that amendment?

Mr. Cohen: Yes, your Honor, considerable. At the outset Mr. Weinberg stated that he wanted to withdraw the amendment as he proposed it last week.

The Court: I understand all amendments, all motions were withdrawn.

Mr. Cohen: That is right.

The Court: And the only motion before the Court now is the motion to amend in the manner stated.

Mr. Cohen: Now he is asking for the very same thing which he said he had been withdrawing. He has not changed the amendment in any effect. In fact, it is the

very same amendment that he urged from the beginning. It is even more extensive than the amendment that he urged in the beginning because he now compels us for the first time to defend against a claim for further overtime beside the original claim for liquidated damages. In other words when he originally framed his issues he asked simply for liquidated damages conceding that he got his full overtime by the payments that were made from October, 1938, until April 20, 1942. By this amendment now he seeks to go back to ask for further overtime for that period which he already conceded he got his overtime for and come forward from the 98
period of the release to the present date and ask for both liquidated damages and overtime.

That brings us back to the same point we started at the beginning of this argument. We are not prepared to litigate the question of anything due whether it is liquidated damages or overtime for the period after the release. That will require the interpretation of new contracts, it will require bringing in all these questions which we stated at the beginning we could not prepare properly for, which we thought we should bring counsel in on behalf of the Realty Advisory Board, and I am advised this morning such counsel is here with a request 99
of their own on this particular matter and possibly if your Honor is minded to continue—

* * * * * *

Mr. Bruce: My name is Robert R. Bruce. I have been retained by Mr. Caine to oppose this motion. I am speaking with Mr. Cohen's and Mr. Caine's permission representing both defendants. I am retained to try part of this action in the event your Honor amends the complaint.

* * * * * *

The Court: On all that has been disputed and argued up to date I am now saying that my position is this: I

will allow the plaintiff to amend his complaint so that it shall permit him to recover, as he is willing to do, so that he shall be limited to the $188 in the first cause of action which was found by the Division, and I will allow him to prove whether he is entitled to overtime on the basis of that $188 up to—what date was it?

Mr. Bruce: December 10, 1943.

Mr. Weinberg: No, your Honor means first the prior period?

The Court: Yes. $188 up to what date?

Mr. Weinberg: April 20, 1942.

The Court: For wages earned up to April 20, 1942. And I will permit the complaint to be amended so that he can prove what the regular wages were and his overtime and his liquidated damages between that date and the date of the filing of the complaint.

Mr. Weinberg: All right, your Honor.

Mr. Bruce: May I be heard on that?

The Court: The defense has exceptions. I have heard enough.

Mr. Bruce: There is one point I haven't had an opportunity to go into.

The Court: And I will allow the prayer for damages to be amended accordingly. I will allow similar amendments as to each cause of action.

Mr. Weinberg: I overlooked stating to your Honor that the motion to include the two new plaintiffs, John H. Berger and George Berger is renewed. I am afraid that by mistake I withdrew that motion.

The Court: That was consented to.

Mr. Bruce: It has been consented to but only to the extent that they are permitted to join this action and to recover in this action up to April 20, 1942. It is not consented in this subsequent period.

The Court: Yes.

Motion to Amend Amended Answer 103

The Court: It will be understood that every conceivable defense made to the complaint has been interposed.

Mr. Weinberg: I so stipulate.

The Court: He so stipulates.

Mr. Weinberg: I will plead surprise to nothing.

Mr. Bruce: Well, may we have an opportunity to file a written answer and to make certain motions on the basis of those defenses?

The Court: If you want at any time to limit the generality of that stipulation you may do it by limitation and putting up specific defenses. He is giving you every defense. 104

Mr. Weinberg: Every conceivable defense as the trial goes on.

* * * * * *

Mr. Bruce: I want to take exception first to your Honor's ruling and I want to state the exception.

* * * * * *

Motion to Amend Amended Answer.

Mr. Bruce: I am about to make a motion, your Honor.

The Court: Make your motion. Tell me what it is and I will rule. 105

Mr. Bruce: I haven't anything to move on yet. I want to offer a defense to this new claim as the basis for the motion.

The Court: You want to amend your answer?

Mr. Bruce: Yes, your Honor, we want to amend the answer to plead—

The Court: To state.

Mr. Bruce: To plead the National War Labor Board agreement which I handed your Honor this morning. In substance, we wish to allege that the plaintiffs were members of Local 32-B Building Service Employees International Union throughout the entire period of their employ-

106 *Offering of Exhibits*

ment by the defendant; that on or about September 1st, 1942, that there was entered into between Local 32-B, the union to which these plaintiffs belong, on behalf of all of its members including these plaintiffs, and the Realty Advisory Board on Labor Relations, Inc., on behalf of certain signatory buildings of which the defendant's building was one, a collective bargaining agreement known as the National War Labor Board Agreement; that such agreement was effective by its terms covering the period April 21, 1942, to April 20, 1945; that said agreement is binding on the plaintiffs and on the de-
107 fendants; that the plaintiffs have been paid in full and in strict accordance with that agreement.

* * * * * *

Amended Complaint Filed

New York, November 22, 1944;
10:30 o'clock A. M.

Trial resumed.

* * * * * *

Mr. Weinberg: If your Honor please, defendants'
108 counsel asked me to serve him with a copy of the amended complaint and in order that the record may be clear I want to mark the complaint as amended as an exhibit, or at least hand it up to your Honor.

The Court: That is the complaint as amended?

Mr. Weinberg: As amended, your Honor.

* * * * * *

Offering of Exhibits

Mr. Weinberg: If your Honor please, in view of the discussion about the union agreement, I think it ought to be placed in evidence.

* * * * * *

Offering of Exhibits 109

Mr. Weinberg: I would like to offer it. There is no objection, I understand.

The Court: If there is no objection, I will take it.

(Same marked Plaintiffs' Exhibit 1.)

* * * * * *

Mr. Weinberg: I offer in evidence a stipulation between the attorneys subject to the completion of column 5. I am offering in evidence a stipulation executed between the attorneys subject to the fact that column 5 in paragraphs 5 and 7 has not been filled in and will be filled in before the completion of the entire case, but I am offering the balance of it signed and executed between the attorneys. There will also be added to the stipulation the pay roll referred to in paragraph 10. 110

* * * * * *

Mr. Weinberg: I now offer in evidence, if your Honor pleases, the Sloan agreement referred to in the stipulation.

(Stipulation marked Plaintiffs' Exhibit 2 in evidence.)

(Sloan agreement marked Plaintiffs' Exhibit 3 in evidence.)

Mr. Weinberg: I now offer in evidence the National War Labor Board's directive order and report and recommendations of the Mediation Panel. 111

(Same marked Plaintiffs' Exhibit 4 in evidence.)

* * * * * *

Mr. Weinberg: May I ask for the records pursuant to stipulation that was read in court this morning showing the weekly computation of the work weeks and the payments made to the plaintiffs for the period from October 24, 1938, through April 20, 1942?

* * * * * *

The Court: All he promises to produce is the computation sheets for additional wages of the plaintiffs.

* * * * * *

112 *Offering of Exhibits*

Mr. Weinberg: May I ask that they be marked for identification?

The Court: Mark them for identification.

* * * * * *

(Papers marked Plaintiffs' Exhibit 5 for identification.)

* * * * * *

Mr. Weinberg: I now offer them in evidence, your Honor.

The Court: All right, put them in evidence.

113 (Plaintiffs' Exhibit 5 for identification received in evidence.)

* * * * * *

New York, November 24, 1944, 10:30 A. M.

Trial resumed.

Mr. Weinberg: I call upon defendants' counsel to produce the weekly pay roll records covering these plaintiffs and their payments for the period between April

114 20, 1942, and December 10, 1943.

* * * * * *

Mr. Weinberg: If counsel will let me, I will mark them in evidence now.

* * * * * *

Mr. Bruce: No objection.

* * * * * *

The Clerk: It will take too long to mark them individually. May I just mark them as one exhibit and then mark any that is referred to separately?

The Court: Yes.

(Marked Plaintiffs' Exhibit 6, consisting of 91 sheets.)

* * * * * *

Stipulation re Exhibits. 115

UNITED STATES CIRCUIT COURT OF APPEALS.

FOR THE SECOND CIRCUIT.

FRANK ASSELTA, CAMILO DEL RIO, JOSEPH McARDLE, SAMUEL MANNE, CORNELIUS McCOLE, BURTON PETERSON, FRANK RODRIGUEZ, JAMES TORRA, JOHN H. BERGER and GEORGE BERGER,
Plaintiffs-Appellees,
against 116
149 MADISON AVENUE CORP. and WILLIAMS & Co., Inc.,
Defendants-Appellants.

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto that the plaintiffs' exhibits numbered 1, 3, 4, 5 and 6 shall be omitted from the transcript of record on appeal, but shall be deemed to be included as part of the record on appeal with the same force and effect as if set forth in full in said transcript of record on appeal and that three copies of each exhibit specified above shall be 117 handed up to the Circuit Court of Appeals.

Dated: New York, N. Y., April 2, 1946.

DUBERSTEIN & NIMKOFF
Attorneys for Plaintiffs-Appellees.
JOSEPH CAINE
Attorney for Defendants-Appellants

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Plaintiffs' Exhibit 1.

National War Labor Board Agreement.

(Omitted pursuant to stipulation.)

Plaintiffs' Exhibit 2.

DISTRICT COURT OF THE UNITED STATES,

119 FOR THE SOUTHERN DISTRICT OF NEW YORK.

GEORGE ANDERSON, FRANK ASSELTA, CAMILO DEL RIO, JOSEPH MCARDLE, SAMUEL MANNE, CORNELIUS MCCOLE, BURTON PETERSON, FRANK RODRIGUEZ and JAMES TORRA,

Plaintiffs,

against

149 MADISON AVENUE CORP. and WILLIAMS & CO., INC.,

Defendants.

} Stipulation of Facts

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IT IS STIPULATED AND AGREED by and between the attorneys for the respective parties as follows:

1. That the plaintiffs, George Anderson, Camilo Del Rio, Samuel Manne, Cornelius McCole, Burton Peterson, and James Torra for the period April 21, 1942 to December 10, 1943, were employed and paid in accordance with the terms and conditions of employment provided in a collective bargaining agreement known as the National War Labor Board Agreement.

Plaintiffs' Exhibit 2

2. That the said plaintiffs enumerated in pargraph 1, while employed at 149 Madison Avenue, have been at all times members of Local 32-B, Building Service Employees International Union. 121

3. That for the period April 21, 1942 to date, the defendant 149 Madison Avenue Corp. has been a party to, and the building involved in this action 149 Madison Avenue, New York, N. Y., has been a signatory building under said National War Labor Board Agreement, as a Class C loft building.

4. The periods of employment of the respective plaintiffs at 149 Madison Avenue were as follows: 122

Plaintiff's Name	Periods of Employment
George Anderson	10/24/38-12/10/43
Frank Asselta	10/24/38-4/5/42
Camilo Del Rio	10/24/38-12/10/43
Joseph McArdle	10/24/38-9/27/40
Samuel Manne	10/24/38-12/10/43
Cornelius McCole	4/5/40-12/10/43
Burton Peterson	10/24/38-8/7/43
Frank Rodriguez	7/26/41-1/25/43
James Torra	10/24/38-12/10/43
John H. Berger	8/24/40-12/10/43
George Berger	8/19/39-8/29/40

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5. That the said plaintiffs enumerated in paragraph 1 were employed and actually worked pursuant to the terms of said National War Labor Board Agreement during the periods specified below on the following basis:

124 *Plaintiffs' Exhibit 2*

(1) Plaintiff's Name	(2) Period	(3) Total Hours Regularly Employed Per Week	(4) Weekly Wages or Earnings	(5)* Number of Regular Work Weeks in Period*
Anderson	4/21/42-8/8/42	47	27.50	15
	8/10/42-4/20/43	46	27.50	27
	4/24/43-12/10/43	46	28.90	30
125 Del Rio	4/21/42-8/8/42	47	27.50	14
	8/10/42-4/20/43	46	27.50	31
	4/21/43-12/10/43	46	28.90	30
Manne	4/21/42-8/8/42	47	27.50	16
	8/10/42-4/20/43	46	27.50	33
	4/21/43-12/10/43	46	28.90	33
McCole	4/21/42-6/13/42	60	27.50	8
	6/15/42-8/8/42	59	27.50	8
	8/10/42-4/20/43	54	27.50	35
	4/21/43-12/10/43	54	28.90	34
Peterson	4/21/42-8/8/42	47	27.50	14
126	8/10/42-4/20/43	46	27.50	32
	4/21/43-8/7/43	46	28.90	11
Torra	4/21/42-8/8/42	47	30.50	15
	8/10/42-4/20/43	46	30.50	35
	4/21/43-12/10/43	46	31.90	33

6. That the plaintiffs enumerated in paragraph 1, if employed during the period April 24, 1939 to April 20, 1942, were employed pursuant to a collective bargaining agreement known as the Sloan Agreement.

*This column represents the number of weeks in the specified period for each plaintiff during which he worked the regular work week as set forth in the third column, and excludes weeks during which plaintiffs worked 40 hours or less.

Plaintiffs' Exhibit 2

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7. That the plaintiffs, J. H. Berger and Frank Rodriguez, for the period of their employment subsequent to April 21, 1942, were employed and actually worked on the basis of the following regular work weeks and weekly wages, and they agreed with their employer that their hourly rates for said employment would be determined by dividing their weekly earnings by the number of hours employed plus one-half of the number of hours actually employed in excess of 40 hours:

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(1) Plaintiff's Name	(2) Period	(3) Total Hours Regularly Employed Per Week	(4) Weekly Wages or Earnings	(5) Number of Regular Work Weeks in Period*
J. H. Berger	4/21/42-9/4/42	48	40.00	16
	9/5/42-4/20/43	48	45.00	33
	4/21/43-12/10/43	48	50.00	35
Rodriguez	4/21/42-9/5/42	48	30.00	19
	9/6/42-1/25/43	46	30.00	16

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8. That as of October 24, 1938, and for the weekly periods immediately prior to the effective date of the Fair Labor Standards Act of 1938, the regular weekly hours and weekly wages of the plaintiffs then employed at 149 Madison Avenue, were as follows:

*This column represents the number of weeks in the specified period for each plaintiff during which he worked the regular work week as set forth in the third column, and excludes weeks during which plaintiffs worked 40 hours or less.

130 *Plaintiffs' Exhibit 2*

Plaintiff's Name	Regular Weekly Hours	Weekly Wages
George Anderson	48	23.00
Frank Asselta	60	23.00
Camilo Del Rio	48	23.00
Joseph McArdle	48	23.00
Samuel Manne	48	23.00
Burton Peterson	48	23.00
James Torra	48	28.00

9. That as of April 20, 1942, and for the weekly pe-
131 riods immediately prior to the effective date of the said National War Labor Board Agreement, the regular weekly hours and weekly wages of the plaintiffs then employed at 149 Madison Avenue, were as follows:

Plaintiff's Name	Regular Weekly Hours	Weekly Wages
George Anderson	47	25.00
Camilo Del Rio	47	25.00
Samuel Manne	47	25.00
Cornelius McCole	60	25.00
Burton Peterson	47	25.00
Frank Rodriguez	47	30.00
132 James Torra	47	28.00
J. H. Berger	48	40.00

10. That each plaintiff, for the period April 21, 1942 to December 10, 1943, signed the employer's weekly pay roll for each week of his employment during said period, opposite the horizontal column showing his hours worked and wages paid therefor under the following legend: "Received amount as stated in column marked 'Total Compensation' in full for all services rendered as of this date." Attached hereto marked Exhibit A and
4 made a part hereof, is a photostatic copy of a pay roll for the week beginning January 3, 1943 and ending Jan-

Plaintiffs' Exhibit 2 133

uary 9, 1943, which is typical of the employer's pay roll for prior and subsequent periods.

11. That in the negotiations leading to said National War Labor Board Agreement, it was agreed in substance between the Negotiating Committees of the Union and the employers that the wages and hourly rates agreed upon for any agreement succeeding the said Sloan Agreement would be retroactive to April 21, 1942.

12. That upon the trial of this action, defendants may introduce in evidence copies of the Sloan Agreement, the National War Labor Board Agreement, the National 134
War Labor Board's Directive Order dated July 29, 1942, and the Report and Recommendations of the Mediation Panel of said Board in Case No. 141 between Realty Advisory Board on Labor Relations and Building Service Employees International Union Local 32-B, subject to any objections which the plaintiffs may make as to the materiality and relevancy of such documents.

Dated: November 22, 1944.

SAMUEL D. FRIEDMAN
Attorney for Plaintiffs
JOSEPH CAINE
Attorney for Defendants 135

136 **Plaintiffs' Exhibit 3.**

Sloan Agreement.

(Omitted pursuant to stipulation.)

Plaintiffs' Exhibit 4.

National War Labor Board's Directive Order.

137 (Omitted pursuant to stipulation.)

Plaintiffs' Exhibit 5.

Computation sheets for additional wages for period October 24, 1938, to April 20, 1942.

(Omitted pursuant to stipulation.)

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138 **Plaintiffs' Exhibit 6.**

Weekly pay roll records for period April 20, 1942, to December 10, 1943.

(Omitted pursuant to stipulation.)

Defendants' Exhibit B. 139

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

FRANK ASSELTA, CAMILO DEL RIO, JOSEPH McARDLE, SAMUEL MANNE, CORNELIUS McCOLE, BURTON PETERSON, FRANK RODRIGUEZ, JAMES TORRA, JOHN H. BERGER and GEORGE BERGER, Plaintiffs, against 149 MADISON AVENUE CORP. and WILLIAMS & Co., Inc., Defendants.	Additional Stipulation of Facts 140

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties as follows:

1. That this stipulation shall supplement the testimony and Exhibits received upon the trial of this action and shall be marked in evidence as defendants' Exhibit "B."

2. That throughout the period succeeding September 141
5, 1942, the situations referred to in the following subdivisions hereof were taken care of in the manner therein severally set forth as follows:

(a) When during any workweek an employee was absent for part of that workweek because of "sickness, or other excusable causes" and therefore actually worked less hours than regularly scheduled, he was paid for those hours which would, but for those excusable absences, have exceeded 40 hours, at the rate of time and one-half the hourly rate as computed under the National War Labor Board agreement hereinafter in this paragraph 2 referred to as "the contract." Thus, an employee reg-

142 *Defendants' Exhibit B*

ularly scheduled to work 46 hours during the workweek who was absent for illness for two days (or 16 hours) was shown on the payrolls as working 24 hours of straight time for a compensation of 24 times the hourly rate as computed in the contract and six hours of overtime for a compensation of six times one and one-half times the hourly rate as computed in the contract. This was done pursuant to Sub-Division 5 (i) of Section III (Page 29 of Plaintiffs' Exhibit 1). For example, see Plaintiffs' Exhibit "6," payroll of Peterson, December 13 to De-
143 cember 19, 1942.

(b) When during any workweek an employee was absent for part of that workweek for an inexcusable cause and therefore actually worked less hours than regularly scheduled, he was paid for the number of hours actually worked on the basis of regular time, *i. e.*, at the hourly rate as computed in the contract, except for hours actually worked in excess of 40 hours in which latter event he would be paid for such excess hours at the rate of one and one-half times the hourly rate as computed in the contract. Thus, an employee regularly scheduled to work 46 hours during the workweek who was
144 absent three days (or 23 hours) for inexcusable cause was shown on the payrolls as working 23 hours and receiving compensation therefor at the rate of 23 times the hourly rate as computed in the contract. For example, see Plaintiffs' Exhibit "6," payroll of Peterson for February 28 to March 6 ,1943.

(c) Absences shown for the following employees during the following periods were "inexcusable":

Del Rio	7/ 4/43—7/10/43
Peterson	2/28/43—3/ 6/43
	6/ 6/43—6/12/43
	6/20/43—6/26/43
	8/ 1/43—8/ 7/43

(d) Holidays not worked but paid for were treated as time worked in computing overtime hours under the National War Labor Board Agreement. Holidays not worked, which are indicated by the symbol "HD," are not shown as hours worked, but the employee is credited with those number of hours which normally and except for the holiday would have been designated as overtime hours and paid therefor at the rate of one and one-half times the hourly rate as computed in the contract. Thus, an employee who did not work but was paid for a holiday (8 hours) is shown as working 38 hours and receiving compensation therefor at 40 times the hourly 146
rate as computed in the contract and six times one and one-half times the hourly rate as computed in the contract. For example, see Plaintiffs' Exhibit "6," payroll for November 22 to November 28, 1942.

3. That the plaintiffs J. H. Berger and Frank Rodriguez throughout the period succeeding September 5, 1942, were paid for hours between 40 per week and their regular workweek at the rate of time and one-half the hourly rate as computed pursuant to paragraph 7 of Plaintiffs' Exhibit "2" as amended in paragraph 5 hereof and for hours in excess of their regular workweek time and three-quarters the hourly rate as computed 147
pursuant to paragraph 7 of Plaintiffs' Exhibit "2" as amended in paragraph 5 hereof and were also paid in accordance with the practices referred to in paragraph 2 of this stipulation.

4. That paragraph 5 of Plaintiffs' Exhibit "2" be amended to read as follows:

> "That the said plaintiffs enumerated in paragraph 1 were employed and actually worked pursuant to the terms of said National War Labor Board Agreement during the periods specified below on the following basis:

148 *Defendants' Exhibit B*

(1) Plaintiff's Name	(2) Period	(3) Total Hours Regularly Employed Per Week	(4) Weekly Wages or Earnings	(5) Number of Regular Work Weeks in Period*
Del Rio	4/21/42-8/ 8/42	47	$27.50	13
149	8/10/42-4/20/43	46	27.50	31
	4/21/43-12/11/43	46	28.90	30
Manne	4/21/42-8/ 8/42	47	27.50	15
	8/10/42-4/20/43	46	27.50	34
	4/21/43-12/11/43	46	28.90	31
McCole	4/21/42-6/13/42	60	27.50	8
150	6/15/42-8/ 8/42	59	27.50	7
	8/10/42-4/20/43	54	27.50	36
	4/21/43-12/11/43	54	28.90	32
Peterson	4/21/42-8/ 8/42	47	27.50	15

*This column represents the number of weeks in the specified period for each plaintiff during which he worked the regular work week as set forth in the third column, and excludes weeks during which plaintiffs worked 40 hours or less.

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(1)	(2)	(3)	(4)	(5)
Plaintiff's Name	Period	Total Hours Regularly Employed Per Week	Weekly Wages or Earnings	Number of Regular Work Weeks in Period*
	8/10/42-4/20/43	46	27.50	29
	4/21/43-8/ 7/43	46	28.90	11
Torra	4/21/42-8/ 8/42	47	30.50	15
	8/10/42-4/20/43	46	30.50	32
	4/21/43-12/11/43	46	31.90	29"

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5. That paragraph 7 of Plaintiffs' Exhibit "2" be amended to read as follows:

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"That the plaintiffs, J. H. Berger and Frank Rodriguez, for the period of their employment subsequent to April 21, 1942, were employed and actually worked on the basis of the following regular work weeks and weekly wages, and they agreed with their employer that their hourly rates for said employment would be determined by dividing their weekly earnings by the number of hours employed plus one-half of the number of hours actually employed in excess of 40 hours:

*This column represents the number of weeks in the specified period for each plaintiff during which he worked the regular work week as set forth in the third column, and excludes weeks during which plaintiffs worked 40 hours or less.

154 *Defendants' Exhibit B*

(1) Plaintiff's Name	(2) Period	(3) Total Hours Regularly Employed Per Week	(4) Weekly Wages or Earnings	(5) Number of Regular Work Weeks in Period*
Berger, J. H.	4/21/42-9/12/42	48	$40.00	18
	9/14/42-3/20/43	48	45.00	23
155	3/21/43-12/11/43	48	50.00	36
Rodriguez	4/21/42-8/ 8/42	48	30.00	14
	8/10/42-1/25/43	46	30.00	21"

6. That it is the intention and expectation of the parties that if the plaintiffs are entitled to recover for any part of the period for which suit is brought, the amount of such recovery will become the subject of a stipulation; 156 if and to the extent that such stipulation be not made, then each of the parties reserves the right, subject to the acceptance thereof by the Court, to submit their computations to the Court upon the final submission of the controversy.

7. This stipulation is not intended to supersede the exhibits which have been marked in evidence, except in so far as plaintiffs' Exhibit 2 has been amended by this stipulation. In the event of any contradiction between

*This column represents the number of weeks in the specified period for each plaintiff during which he worked the regular work week as set forth in the third column, and excludes weeks during which plaintiffs worked 40 hours or less.

this stipulation and the other exhibits marked in evidence, except as above referred to, and except that the schedules set forth in paragraph 4 hereof reflects for the specified periods weekly earnings on the basis of certain retroactive adjustments that were made pursuant to Article VIII, page 12, of the National War Labor Board agreement, the other exhibits shall prevail. Moreover, this stipulation is not intended to preclude either party from showing errors in calculation or otherwise, if any, on specific payrolls (Plaintiffs' Exhibit 6).

Dated: New York, January 2, 1945. 158

SAMUEL D. FRIEDMAN
Attorney for Plaintiffs
JOSEPH CAINE
Attorney for Defendants.

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160 **Findings of Fact and Conclusions of Law.**

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

This cause having been tried and the court having heard the evidence and considered the stipulations of the parties, finds the facts and states the conclusions of law as follows:

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Findings of Fact

1. At all the times throughout the period between April 21, 1942 and December 10, 1943 each of the plaintiffs was a resident of the City and State of New York.

2. At all the times throughout the period between April 21, 1942 and December 10, 1943 the defendant 149 Madison Avenue Corp. was a domestic corporation organized and existing under and by virtue of the laws of the State of New York and having its principal place of business at 149 Madison Avenue, in the City, County
162 and State of New York.

3. At all the times throughout the period between April 21, 1942 and December 10, 1943 the defendant Williams & Co., Inc. was a domestic corporation organized and existing under and by virtue of the laws of the State of New York and having its principal place of business at 1178 Broadway, in the City, County and State of New York.

4. At all the times throughout the period between April 21, 1942 and December 10, 1943, the defendant 149 Madison Avenue Corp. owned and controlled the loft

building located at and known as 149 Madison Avenue, New York, N. Y.

5. At all the times throughout the period between April 21, 1942, and December 10, 1943, the defendant William & Co., Inc., acted as the agent of and for the account of the defendant 149 Madison Avenue Corp. in the management and operation of the building known as and located at 149 Madison Avenue, New York, N. Y., had full authority to hire and fire employees engaged in the operation and maintenance of the said building, and issued instructions to and otherwise controlled, directed, managed and super- 164
vised the maintenance employees of the said building including the plaintiffs herein in the performance of their duties.

6. At all the times throughout the periods hereinbelow specified with respect to the plaintiffs severally, each of the plantiffs was employed by the defendants as a maintenance or service employee of the building known as and located at 149 Madison Avenue, New York, N. Y., and performed all his duties as such service employee at the said building:

Camilo Del Rio	April 21, 1942 to Dec. 10, 1943	
Samuel Manne	April 21, 1942 to Dec. 10, 1943	165
Cornelius McCole	April 24, 1942 to Nov. 20, 1943	
Burton Peterson	April 21, 1942 to July 31, 1943	
Frank Rodriguez	April 21, 1942 to Jan. 23, 1943	
James Torra	April 21, 1942 to Dec. 10, 1943	
John H. Berger	April 21, 1942 to Dec. 10, 1943	

7. At all the times throughout the period between April 24, 1942, and December 10, 1943, the building known as and located at 149 Madison Avenue, New York, N. Y., consisted of 12 floors comprising 7,700 sq. ft. each and a basement whose rentable portion comprised 3,850 sq. ft.

166 *Findings of Fact and Conclusions of Law*

8. At all the times throughout the period between April 21, 1942, and December 10, 1943, the total rentable area of the building known as and located at 149 Madison Avenue, New York, N. Y., comprised 96,250 sq. ft.

9. At all the times throughout the period between April 21, 1942, and December 10, 1943, the actually rented area of the building known as and located at 149 Madison Avenue, New York, N. Y., was 86,500 sq. ft.

10. At all the times throughout the period between April
167 21, 1942, and December 10, 1943, a substantial amount of the rentable area of the building known as and located at 149 Madison Avenue, New York, N. Y., was occupied by tenants in the production of goods for commerce among the several States and to places outside the State of New York.

11. Each of the plaintiffs, at all the times of his employment as a maintenance or service employee of the building known as and located at 149 Madison Avenue, New York, N. Y., was engaged therein in the production of goods for interstate commerce or in conduct necessary to the production of goods for interstate commerce.

168 12. In the period succeeding April 20, 1942, the plaintiffs Camilo Del Rio, Samuel Manne, Cornelius McCole, Burton Peterson, Frank Rodriguez, James Torra and John H. Berger each worked in his employment as a service employee of the building known as and located at 149 Madison Avenue, New York, N. Y., for hours in excess of 40 hours a week.

13. The plaintiffs whose workweeks during the period succeeding April 20, 1942, exceeded 40 hours did not receive compensation for such excess hours at rates equal to at least 1 1/2 times the regular hourly rates at which they were employed.

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14. The plaintiffs Camilo Del Rio, Samuel Manne, Cornelius McCole, Burton Peterson, Frank Rodriguez, James Torra and John H. Berger were paid for the period succeeding April 20, 1942, pursuant to the terms and practices of an agreement (operating retroactively from September 5, 1942) between the Realty Advisory Board on Labor Relations, Inc., a voluntary and not an official organization, and Local 32-B of the Building Service Employees International Union of which all the said plaintiffs except Frank Rodriguez and John H. Berger were members.

15. For their employment periods which succeeded April 20, 1942, the said plaintiffs were employed by the defendants at fixed weekly rates of compensation. 170

16. The agreement pursuant to which the said plaintiffs were paid for the period succeeding April 20, 1942, contained the following provision:

> "The hourly rates for those regularly employed more than forty (40) hours per week shall be determined by dividing their weekly earnings by the number of hours employed plus one-half of the number of hours actually employed in excess of forty (40) hours."

17. The agreement formula for determining the hourly rates of those employees who were regularly employed more than 40 hours per week did not correctly calculate or determine the true hourly rates of their employment. 171

18. The agreement formula for determining the hourly rates of those employees who were regularly employed more than forty (40) hours per week was designed to offset the full overtime costs which would ensue if hourly rates were computed in the ordinary way.

19. The purpose of the agreement formula for determining the hourly rates of those employees who were regularly employed more than 40 hours per week was to re-

172 *Findings of Fact and Conclusions of Law*

duce the hourly rate sufficiently so the payment of time and a half for overtime would not bring the total weekly earnings substantially above the weekly rates set by the agreement.

20. The agreement formula was not strictly followed. During certain weeks between April 21, 1942, and December 10, 1943, while a plaintiff's agreed regular workweek and weekly wage remained unchanged, the number of hours over 40 actually worked by him differed from the number of hours over 40 in his regular workweek. In
173 such situations, under the agreement formula the hourly rates should have fluctuated from week to week in accordance with the variations of overtime worked. In fact they did not so vary, but remained the same from week to week as if the plaintiff actually worked only the regular workweek.

21. For their several employment periods which succeeded April 20, 1942, the excess, above the compensation actually received, which the several plaintiffs were entitled to receive if the hours worked in excess of 40 per week had been compensated at the rate of 1 1/2 times their several regular hourly rates, was as follows:

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Camilo Del Rio	April 21, 1942 to Sept. 5, 1942	$33.05
	Sept. 5, 1942 to Dec. 10, 1943	87.96
Samuel Manne	April 21, 1942 to Sept. 5, 1942	$39.41
	Sept. 5, 1942 to Dec. 10, 1943	85.86
Cornelius McCole	Apr. 21, 1942 to Sept. 5, 1942	$72.60
	Sept. 5, 1942 to Nov. 20, 1943	164.78
Burton Peterson	Apr. 21, 1942 to Sept. 5, 1942	$33.91
	Sept. 5, 1942 to July 31, 1943	62.43
Frank Rodriguez	Apr. 21, 1942 to Sept. 5, 1942	$38.90
	Sept. 5, 1942 to Jan. 23, 1943	31.33
James Torra	Apr. 21, 1942 to Sept. 5, 1942	$41.52
	Sept. 5, 1942 to Dec. 10, 1943	102.31
John H. Berger	Apr. 21, 1942 to Sept. 5, 1942	$55.45
	Sept. 5, 1942 to Dec. 10, 1943	199.94

22. The fair and reasonable value of the services rendered by the attorneys for the plaintiffs in the preparation and litigation of so much of their several causes of action as pertained to the employment periods succeeding April 20, 1942, is 25% of the total recovery of each plaintiff, computed as follows:

Names of Plaintiffs	Amount of Recovery as Additional Compensation	Amount of Recovery as Liquidated Damages	Plaintiffs' Total Recovery	Attorneys' Fees
Camilo Del Rio	$121.01	$121.01	$242.02	$ 60.50
Samuel Manne	125.27	125.27	250.54	62.63
Cornelius McCole	237.38	237.38	474.76	118.69
Burton Peterson	96.34	96.34	192.68	48.17
Frank Rodriguez	70.23	70.23	140.46	35.11
James Torra	143.83	143.83	287.66	71.91
John H. Berger	255.39	255.39	510.78	127.69

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Conclusions of Law.

1. Jurisdiction is conferred on this Court by 28 U. S. C. A., Section 41(8), and by 29 U. S. C. A., Sections 207, 216(b), also known as the Fair Labor Standards Act of 1938.

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2. Each plaintiff, throughout his employment period as a maintenance or service employee of the building known as and located at 149 Madison Avenue, New York, N. Y., was engaged in the production of goods for commerce among the several states and to places outside the State of New York within the purview of the Fair Labor Standards Act of 1938.

3. The Fair Labor Standards Act of 1938 was applicable to the employment of each of the plaintiffs as a maintenance or service employee of the building known as and located at 149 Madison Avenue, New York, N. Y.

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4. With respect to the employment of each of the plaintiffs as a maintenance or service employee of the building known as and located at 149 Madison Avenue, New York, N. Y., each of the defendants was and acted as the employer within the purview of the Fair Labor Standards Act of 1938 and, in particular, within the purview of Section 3(d) of the Act.

5. Each of the plaintiffs who worked in his said employment for the defendants during the period after April 20, 1942, is entitled to recover from the defendants both
179 for additional compensation arising out of the defendants' failure to have compensated him for overtime hours at the rate of at least 1 1/2 times the regular rate at which he had been employed and, in addition thereto, in an equal amount as liquidated damages, plus attorneys' fees and the costs of the action, pursuant to the provisions of the Fair Labor Standards Act of 1938, Secs. 7 and 16(b).

6. This action is brought to recover upon a liability created by statute, other than a statutory penalty or forfeiture, and the only statute of limitations which is applicable to such a suit is the six-year statute set forth in Civil Practice Act, Sec. 48(2).

180 7. Each and all of the defenses interposed by the defendants are dismissed and stricken out.

8. Plaintiffs' attorneys are entitled to attorneys' fees in the amount of 25% of the total amount recovered by each plaintiff.

9. The plaintiffs are entitled to judgment as follows:

Names of Plaintiffs	Total Amount of Recovery (Exclusive of attorneys' fees)	Attorneys' Fees	Total Amount
Camilo Del Rio	$242.02	$ 60.50	$302.52
Samuel Manne	250.54	62.63	313.17
Cornelius McCole	474.76	118.69	593.45
Burton Peterson	192.68	48.17	240.85
Frank Rodriguez	140.46	35.11	175.57
James Torra	287.66	71.91	359.57
John H. Berger	510.78	127.69	638.47

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10. Plaintiffs shall have the costs and disbursements of this action.

Dated, New York, February 28th, 1946.

WM. BONDY,
United States District Judge.

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184 **Opinion by Bondy, J.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Samuel D. Friedman, Esq., By Frederick E. Weinberg, Esq., for Plaintiffs.

Joseph Caine, Esq., By Moses M. Cohen, Esq., For 149 Madison Avenue Corp.

185 Messrs. McLanahan, Merritt & Ingraham, By Robert R. Bruce, Esq., For Williams & Co., Inc.

BONDY, District Judge:

This action was brought by maintenance employees in a building owned by the defendant, 149 Madison Avenue Corp. and operated by the defendant, Williams & Co., Inc., to recover unpaid overtime compensation, liquidated damages and a reasonable attorney's fee pursuant to Secs. 7 and 16(b) of the Fair Labor Standards Act of 1938, 29 U. S. C. A. Secs. 207, 216(b).

The building consists of a basement and 12 floors, each 186 covering 7700 square feet. Of the basement, only 3850 square feet are rentable. The total rentable area of the building is 96,250 square feet.

Maintenance employees of a building in which at least 20 per cent of the rentable area is devoted to production of goods for interstate commerce are to be regarded as engaged in an occupation necessary to the production of goods for commerce and are covered by the Act. Baldwin v. Emigrant Industrial Savings Bank, 150 F. (2d) 524, 525, certiorari denied November 13, 1945; Fleming v. Post, 146 F. (2d) 441, 443; Gangi v. D. A. Schulte, 150 F. (2d) 694, 696. See Kirschbaum Co. v. Walling, 316 U. S. 517; Walling v. Jacksonville Paper Co., 317 U. S. 564, 572.

A tenant is engaged in production of goods for interstate commerce if at least 20 per cent of his activity is directed on the premises to the production of such goods, Fleming v. Post, *supra,* which authority is deemed binding on this court. Under Sec. 3(j) of the Act, 29 U. S. C. A., Sec. 203(j), handling of goods incidental to their preparation for shipment in interstate commerce is sufficient to constitute production thereof. Baldwin v. Emigrant Industrial Savings Bank, *supra;* Fleming v. Post, *supra.* See Western Union v. Lenroot, 323 U. S. 490, 503.

Testimony was given as to the extent of occupancy and the nature of the business of only five out of about twenty 188
tenants.

Lawrence Fertig & Co. were engaged in creating on the premises advertising material for their clients. They shipped from the premises at least 1,750 engraving plates of the advertisements per month for use in publications outside the state. This constituted more than 50 per cent of the business they conducted on the premises and yielded more than 50 per cent of their revenue. Gehring Laces, Inc., was a wholesale jobber of laces and embroideries which were manufactured for it elsewhere and delivered at the premises. From 25 to 30 per cent of its revenue of over $1,000,000 each year was derived from goods shipped 189
from the premises to places outside the state. Oliver & Kaufman converted goods on the premises and shipped them to places outside of the state to the extent of about 75 per cent of their billings. Each of these tenants occupied a floor, or together 23,100 square feet, amounting to 24 per cent of the rentable space. At least 20 per cent of the activities of each of these consisted in handling goods for interstate commerce on the premises. The plaintiffs accordingly are covered by the Act. This is so without the inclusion of the Dell Publishing Company which did on the premises all the preliminary and creative work for its publications but none of the printing or purely me-

chanical work. It shipped therefrom only a comparatively small number of complimentary copies to advertisers and others at special request, amounting at most to 1/10th of one per cent of all copies of its publications. This is also exclusive of the Atlanta Knitting Mills, which maintained only their executive offices at Madison Avenue, but carried on all their manufacturing at a mill in Catskill, New York, from which all shipments were made to points outside of New York City. The goods of these tenants were produced elsewhere without any manufacturing or substantial handling on the premises. Cf. 10 East 40th Street
191 Building, Inc., v. Callus, 325 U. S. 578.

It is not essential that the plaintiffs prove their damages with mathematical precision. Caperna v. Williams-Bauer Corp., 184 Misc. 192, cited with approval in De Pasquale v. Williams-Bauer Corp., 151 F. (2d) 578, 579. For the period from October 24, 1938, to April 20, 1942, the overtime worked by plaintiffs was based on computations made by an accountant from the pay rolls of the defendant, Williams & Co., Inc., and audited by the Wage and Hour Division. The maintenance manager of Williams & Co. testified that only infrequently were unworked hours not noted on the pay rolls. Compensation based on these
192 computations was subsequently paid by the defendants to the plaintiffs in exchange for receipts and general releases.

The record does not disclose that there was any dispute of any kind culminating in the payments of overtime compensation for this period. There accordingly was not any accord and satisfaction of the plaintiffs' claims for liquidated damages equal to such compensation. Fleming v. Post, *supra*; Rigopoulos v. Kervan, 140 F. (2d) 506. Nor do the releases constitute a bar or waiver of any right to recover such liquidated damages under the provisions of Sec. 16(b) of the Act. O'Neill v. Brooklyn Savings Bank, 293 N. Y. 666, affirmed 324 U. S. 697; Fleming v. Post, *supra*. See Gangi v. D. A. Schulte, *supra*.

The acceptance by the employees of a belated payment of overtime wages does not preclude recovery of liquidated damages, the right thereto being mandatory. Rigopoulos v. Kervan, *supra*. Nor were these claims barred by the New York three-year statute of limitations relating to actions on statutory penalties or forfeitures. (C.P.A. Sec. 49, subd. 3.) An action under the Fair Labor Standards Act is not an action on a penalty but on a liability created by statute, to which the six-year statute is applicable. (C.P.A. Sec. 48, subd. 2); Walsh v. 515 Madison Avenue Corp., 181 Misc. 219, affirmed 267 App. Div. 756, affirmed 293 N. Y. 826. 194
The liquidated damages constitute additional compensation and not a penalty or punishment. Overnight Motor Co. v. Missel, 316 U. S. 572, 583.

It does not appear definitely on what date before October 1, 1939 Gehring Laces, Inc. occupied any part of the building. Consequently, so far as the record discloses, before October 1, 1939 the tenants engaged in the production of goods for interstate commerce occupied less than 20 per cent. of the rentable area.

Plaintiffs accordingly are entitled to recover liquidated damages in an amount equal to overtime compensation paid to them for the period between October 1, 1939 and 195
April 20, 1942.

Defendants contend that from April 21, 1942 to the time of the service of the complaint, December 10, 1943, during which time defendants kept records of actual hours worked weekly by the plaintiffs, they paid overtime at one and one-half times the hourly rates computed according to a formula contained in an agreement between the Realty Advisory Board on Labor Relations, Inc., a voluntary and not an official organization, and Local 32B of the Building Service Employees International Union, of which most of the plaintiffs were members.

The formula provided: "The hourly rates for those regularly employed more than forty (40) hours per week shall be determined by dividing their weekly earnings by the number of hours employed plus one-half of the number of hours actually employed in excess of forty (40) hours."

The agreement provided a weekly rate for a regular workweek in excess of forty hours and an hourly rate to be derived from such weekly rate by dividing the weekly wage by the number of hours worked plus one-half
197 of the hours actually worked over forty and not by only the number of hours actually worked during the week. This formula was "designed to offset the full overtime costs which would ensue if hourly rates were computed in the ordinary way." Its purpose was "to reduce the hourly rate sufficiently, so the payment of time and a half for overtime * * * will not bring the total weekly earnings substantially above the weekly rates set by the Agreement." (Report of the Mediation Panel of the National War Labor Board p. 70, pursuant to whose recommendations the agreement was promulgated.) In practice the formula was not strictly followed. Between April 21, 1942 and December 10, 1943 the hourly rates
198 were changed by recourse to the prescribed formula only when the regular workweek or the weekly earnings changed, whereas, if the formula had been adhered to, the hourly rates would have fluctuated from week to week in accordance with the variations of overtime worked, regardless of whether or not weekly earnings changed.

Having fixed a weekly wage by agreement, the determination of the regular rate became "a matter of mathematical computation, the result of which is unaffected by any designation of a contrary 'regular rate' in the wage contracts." Walling v. Hardwood Co., 325 U. S. 419, 425. The hourly rates derived by the use of the formula bore no relation to the regular rate of the workweek as

defined in Overnight Motor Co. v. Missel, *supra*. They therefore were ineffective to establish plaintiffs' hourly ordinary time and overtime rates and plaintiffs are entitled to payment of overtime and liquidated damages in accordance with Secs. 7(a) and 16(b) of the Act, 29 U.S.C.A. Secs. 207(a), 216(b). See Watkins v. Hudson Coal Co., 151 F. (2d) 311.

The situation in Walling v. Belo Corp., 316 U. S. 624, is clearly distinguishable since there the contracts provided for an hourly rate and not, as here, for a weekly rate to be reduced to an hourly rate by dividing it by 200
hours in excess of those actually worked during the week.

The fact that defendants here actually applied in all situations the hourly rates so derived does not validate such rates. The manner in which the hourly rate is determined and not the application of an hourly rate is the test. Walling v. Helmerich & Payne, 323 U. S. 37, 42; Walling v. Harnischfeger Corp., 325 U. S. 427; Walling v. Hardwood Co., *supra*; Walling v. Uhlmann Grain Co., 151 F. (2d) 381.

Williams & Co., Inc. acted as the agent of the defendant, 149 Madison Avenue Corp., in the management and operation of the building and had authority to hire and 201
fire employees engaged in its maintenance. The defendant Williams & Co., Inc. is therefore not in a position to urge a dismissal of the complaint as to it on the ground that there was no evidence of its relation to the plaintiffs or the issues. An agent who acts in the interest of an employer in relation to an employee is liable as an "employer" for sums owed by the owners. 29 U.S.C.A. Sec. 203(d); Greenberg v. Arsenal Building Corp., 144 F. (2d) 292.

As has been stipulated, the parties should agree upon the amount of recovery for the period April 21, 1942 to December 10, 1943 in accordance with this opinion.

202 *Opinion by Bondy, J.*

or in the absence of such agreement, both sides should submit proper computations. The amount of the attorney's fee will be determined upon the settlement of the findings.

December 31, 1945.

WM. BONDY
United States District Judge.

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Judgment Appealed From.

DISTRICT COURT OF THE UNITED STATES,

For the Southern District of New York.

[Same Title.]

The issues in the above entitled action having regularly been brought on for trial before Hon. William Bondy, U. S. District Judge, at a term of this Court appointed to be held for the trial of civil actions on November 16, 17, 20, 21, 22 and 24, 1944, and the parties hereto having appeared by counsel, and the issues having been duly tried upon the proofs submitted on behalf of the respective parties, and the Court having duly rendered its decision and opinion in writing dated December 31, 1945, and having made its findings of fact and conclusions of law in writing on February 28th, 1946, and directing that judgment be entered in favor of the plaintiffs against the defendants 149 Madison Avenue Corp. and Williams & Co., Inc., and that attorneys' fees pursuant to Section 16B of the Fair Labor Standards Act be allowed in the sum of $524.70 and costs and disbursements as taxed,

Now, on motion of Samuel D. Friedman, attorney for the plaintiffs, it is

Adjudged that the following named plaintiffs do recover from the defendants, 149 Madison Avenue Corp., having its principal place of business at 149 Madison Avenue, in the Borough of Manhattan, City and State of New York, and Williams & Co., Inc., having its principal place of business at 1178 Broadway, in the Borough of Manhattan, City and State of New York, the respective sums set opposite their names as follows:

208 *Judgment Appealed From*

Name	Amount
Camilo Del Rio	$ 242.02
Samuel Manne	250.54
Cornelius McCole	474.76
Burton Peterson	192.68
Frank Rodriguez	140.46
James Torra	287.66
John H. Berger	510.78
Total	$2,098.90

209 and it is further

ADJUDGED that the plaintiffs Camilo Del Rio, Samuel Manne, Cornelius McCole, Burton Peterson, Frank Rodriquez, James Torra, John H. Berger, do recover of the defendants 149 Madison Avenue Corp. and Williams & Co., Inc. the costs and disbursements as taxed by the Clerk of this Court in the sum of $554.18, together with the sum of $2,098.90 aforesaid, amounting to $2,653.08, and that the plaintiffs have execution therefor.

Approved this 6th day of March, 1946.

WM. BONDY
210 *U. S. D. J.*

Judgment rendered:

WILLIAM V. CONNELL
Clerk

March 8th, 1946.

Defendants' Notice of Appeal.

211

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Sirs:

NOTICE IS HEREBY GIVEN, that 149 Madison Avenue Corp. and Williams & Co., Inc., the defendants above named, hereby appeal to the Circuit Court of Appeals for the Second Circuit, from the final judgment entered in this 212 action on March 8, 1946, and from each and every part of said judgment.

Dated, New York, N. Y., March 18, 1946.

Yours, etc.

JOSEPH CAINE
Attorney for Defendants
Office & P. O. Address
1178 Broadway
Borough of Manhattan
New York, N. Y.

To: 213

WILLIAM V. CONNELL,
Clerk of the United States District Court
for the Southern District of New York.

DUBERSTEIN & NIMKOFF, Esqs.,
Attorneys for Plaintiffs
450 Seventh Avenue
New York, N. Y.

214 **Stipulation After Trial and Decision.**

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

WHEREAS the District Court, by opinion dated December 31, 1945, has rendered a decision after trial wherein the claims of the plaintiffs against the defendants have been found and stated to be valid in certain respects
215 and to be invalid in certain other respects; and

WHEREAS the parties hereto desire legally to create a position wherein part of the matters decided by the said District Court shall be accepted as final and deemed henceforth to have been conclusively determined while other matters which the District Court decided shall be the basis of appeal; and

WHEREAS it is the desire of the parties hereto to set forth their aforesaid intentions and embody them in an agreement to the end of rendering them fixed and legally enforceable,

216 NOW, THEREFORE, the parties agree as follows:

1. Plaintiffs and defendants hereby waive their respective rights to appeal with respect to all issues embracing the period October 24, 1938, to April 20, 1942, without prejudice, however, to plaintiffs' claims for the period succeeding April 20, 1942, and without prejudice to defendants' right to appeal from so much of the decision of the District Court and the judgment to be entered thereon as affects the period succeeding April 20, 1942.

2. Defendants shall pay to plaintiffs on or before February 28, 1946, the following sums representing full payment of liquidated damages for the period from October

1, 1939, to April 20, 1942, all overtime for such period having heretofore been paid:

Plaintiffs	Amount
Frank Asselta	$300.03
Camilo Del Rio	176.66
Joseph McArdle	119.38
Samuel Manne	162.52
Cornelius McCole	234.99
Burton Peterson	172.95
Frank Rodriguez	78.43
James Torra	208.08
John H. Berger	230.11
George Berger	96.28
Total	$1,779.43

218

3. Defendants shall pay to plaintiffs on or before February 28, 1946, the sum of $450.00, being the agreed reasonable attorneys' fee for the services in this litigation which related to the period from October 1, 1939, to April 20, 1942.

4. The findings of fact and conclusions of law and the judgment of the District Court shall be limited to matters pertinent to the period of time which succeeded April 20, 1942. 219

5. Neither the payments by defendants and the acceptance by the plaintiffs or their attorneys of the amounts referred to in "2" and "3" hereof nor the content or form of the findings of fact, conclusions of law or judgment shall constitute the splitting of causes of action nor otherwise prejudice the rights, powers, privileges or immunities of any of the parties with respect to the period or any part of the period succeeding April 20, 1942.

220 *Stipulation After Trial and Decision*

6. Defendants concede that for the entire period of time subsequent to April 20, 1942, each of the plaintiffs was engaged in the production of goods for interstate commerce at the building known as and located at 149 Madison Avenue, New York, N. Y., and that each of the defendants acted as the employer, both within the meaning of the Fair Labor Standards Act of 1938, and the defendants agree that the District Court may so find and that such findings are proper and shall be and remain conclusive.

221 7. It is agreed that the defendants may appeal from so much of the judgment as adjudicates a liability against them for the period, or for any part of the period, succeeding April 20, 1942, except that it is agreed that the defendants may not challenge or appeal from so much of the judgment as determines the applicability of the Fair Labor Standards Act of 1938 to the employment of the plaintiffs.

8. It is agreed that the proposed findings of fact and conclusions of law shall be submitted to the District Court by each of the parties on the 25th day of February, 1946.

9. It is agreed that, on the appeal of the defendants
222 to the Circuit Court of Appeals, Second Circuit, from the judgment to be entered in the District Court, the notice of appeal, record on appeal and the brief to be submitted by the defendants shall be filed by them on or before 45 days after service of the judgment with notice of entry thereof upon the attorneys for the defendants, and that the plaintiffs will file and serve their brief within 30 days after the record and the brief of defendants is filed, and that thereafter neither party shall move or otherwise seek or apply for any adjournment or postponement of the argument or submission of the appeal in the Circuit Court of Appeals, Second Circuit.

If the attorneys for either of the parties, by reason of unusual circumstances, are unable to prepare the case on appeal or file the record or briefs, then the foregoing schedule shall be amended to the extent thus necessitated.

10. With respect to the plaintiff, Anderson, who died pending this action and as to whom the action was discontinued at the trial on that account, defendants agree to pay his legal representative any sums due, in all respects as though he were included as a plaintiff herein, upon presentation to the defendants' attorneys of satisfactory authority and releases. 224

11. The parties hereto agree that the proposed findings of fact and conclusions of law which will be submitted by each to the District Court shall be in conformance with the terms of this stipulation insofar as it is relevant. Neither party will propose any finding of fact or conclusion of law with respect to any matter which is not pertinent to the period succeeding April 20, 1942.

12. The defendants will make no claim nor seek to recover from nor offset against the plaintiffs any part of the monies hereto paid to them by the defendants for overtime compensation covering the period October 24, 1938, to October 1, 1939. 225

13. This stipulation shall be filed with the District Court as part of the record in this case, concurrently with the submission to the Court of the proposed findings of fact and conclusions of law.

Dated: New York, February 21, 1946.

SAMUEL D. FRIEDMAN,
Attorney for Plaintiffs.
JOSEPH CAINE,
Attorney for Defendants.

226 **Stipulation Withdrawing Objections to Amendments to Complaint.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

It is hereby stipulated and agreed by and between the attorneys for the parties hereto that the objection which the defendants made at the trial to the amendments
227 to the complaint are withdrawn for the purposes of the appeal and that the defendants will not claim that the decision of the Trial Court, which allowed such amendments to be made, was improper. Upon the basis of this stipulation, portions of the stenographic minutes of what took place at the trial which bear upon the propriety or impropriety of the amendments to the complaint are omitted from the record on appeal.

Dated: New York, N. Y., April 2, 1946.

DUBERSTEIN & NIMKOFF,
Attorneys for Plaintiffs.

228 JOSEPH CAINE,
Attorney for Defendants.

Stipulation re Designation of Portions of Record to be Contained in the Record on Appeal. 229

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

The parties hereto, by their respective attorneys, stipulate and agree that the record on the appeal of the defendant from the judgment of this Court rendered the 8th day of March, 1946, shall be constituted of the portions of the record, proceedings and evidence in the case 230
as set out hereinbelow, said portions of the record, proceedings and evidence being designated as the record on appeal.

1. Statement under Rule 13, Subdivision 4.

2. Summons and amended complaint.

3. Amended answer.

4. Portions of minutes of trial, before Hon. William Bondy, United States District Judge, on

5. Stipulation herein between plaintiffs and defendants, dated April 2, 1946, stipulating that plaintiffs' exhibits 231
numbered 1, 3, 4, 5 and 6 be omitted from the transcript of record on appeal.

6. Plaintiffs' exhibit numbered 2 and defendants' exhibit B.

7. Findings of fact and conclusions of law, Hon. William Bondy, United States District Judge, dated February 28, 1946.

8. Opinion, Hon. William Bondy, United States District Judge, dated December 31, 1945.

232 *Stipulation re Designation of Portions of Record to be Contained in the Record on Appeal*

9. Judgment, rendered March 8, 1946.

10. Notice of appeal, filed March 26, 1946.

11. Stipulation, dated February 21, 1946.

12. Stipulation, dated April 2, 1946.

13. Designation of portions of record to be contained in the record on appeal—stipulation.

Dated: New York, N. Y., April 2, 1946.

233

DUBERSTEIN & NIMKOFF,
Attorneys for Plaintiffs.

JOSEPH CAINE,
Attorney for Defendants.

234

Stipulation. 235

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated, April // , 1946. 236

DUBERSTEIN & NIMKOFF,
Attorneys for Plaintiffs-Appellees.

JOSEPH CAINE,
Attorney for Defendants-Appellants.

237

238 **Clerk's Certificate.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

I, WILLIAM V. CONNELL, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a true transcript of the record of the said District Court
239 in the above-entitled matter as agreed on by the parties.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, this 22 day of April, in the year of our Lord one thousand nine hundred and forty-six, and of the independence of the said United States the one hundred and seventieth.

WILLIAM V. CONNELL,
Clerk.

(Seal.)

240

[fol. 81] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1945

No. 307

Argued May 13, 1946. Decided June 17, 1946

Docket No. 20237

FRANK ASSELTA, CAMILO DEL RIO, JOSEPH MCARDLE, SAMUEL MANNE, Cornelius McCole, Burton Peterson, Frank Rodriguez, James Torra, John H. Berger and George Berger, Plaintiffs-Appellees,

against

149 MADISON AVENUE CORP. AND WILLIAMS & CO., INC., Defendants-Appellants

Before Chase, Clark and Frank, Circuit Judges.

Appeal from a Judgment of the District Court for the Southern District of New York. Affirmed

Duberstein & Ni nkoff, Attorneys for Plaintiffs-Appellees; Wilbur Duberstein and Frederick E. Weinberg, of Counsel.

Joseph Caine, Attorney for Defendants-Appellants; Walter Gordon Merritt, Robert R. Bruce, and John J. Boyle, of Counsel.

[fol. 82] Per CURIAM:

The appellees and others not parties to this appeal brought this suit in the District Court for the Southern District of New York to recover overtime pay, liquidated damages and a reasonable attorney's fee under §7(a) and §16(b) of the Fair Labor Standards Act, 29 U. S. C. A. §§207(a) and 216(b). It was brought against the owner and the managing agent of a loft building in the City of New York in which the plaintiffs worked as maintenance employees and it has been stipulated that they were engaged in the production of goods for commerce. It originally covered periods both preceding and subsequent to April 20, 1942, but all questions concerning the preceding period have now been adjusted and settled and the sole issue on this appeal is whether the method for the calcu-

lation of overtime pay incorporated in the contract of employment under which the appellees worked after April 20, 1942 conforms to the requirements of the Act. Before April 20, 1942 the appellees were employed to work fixed workweeks exceeding forty hours at fixed weekly wages. Those weekly wages were sufficiently high in each instance so that the hourly rate computed, in what may be called the usual way shown by *Overnight Motor Transportation Co., Inc.* v. *Missel*, 316 U. S. 572, by dividing the amount received by the number of hours worked would amount to more than the statutory minimum. They were also sufficiently high so that the regular hourly rate would exceed the statutory minimum if computed in accordance with a formula which was inserted in a contract of employment covering these employees effective as of September 1, 1942, for the future until April 20, 1945, and made retroactive to April 21, 1942. This formula, sometimes called that of the National War Labor Board Agreement, provided so far as now material, that:

> [fol. 83] "The hourly rates for those regularly employed more than forty (40) hours per week shall be determined by dividing their weekly earnings by the number of hours employed plus one-half of the number of hours actually employed in excess of forty (40) hours."

In making the employment contract of September 1, 1942, the parties did not see fit to agree upon the basis of a designated regular hourly rate of pay for a statutory workweek expressed simply in terms of dollars or cents but retained the previous workweek in excess of forty hours and the previous weekly wage which the appellees had been paid, and subject to future changes in both the workweek and the weekly wage, attempted to bring the agreement within the statute by means of the formula above quoted. The appellants seek to justify this seemingly cumbersome method for compliance with the statute on the ground that the parties understood that the stated weekly wage included what statutory overtime was inherent in the stated workweek. Consequently, so it is argued, it must follow, since the appellees agreed to allocate their weekly wages in accordance with the formula that for the first forty hours their hourly rate would be sufficiently

low (not being less than the statutory minimum) to permit an increase of 50 per cent for the hours in the designated workweek in excess of forty without increasing their weekly pay rate. It is said that, because by the use of the formula such an allocation of the weekly pay may be made by mathematical computation, the contract should be treated as though for each employee an hourly rate so computed had been expressly stated. See, *Bergschneider* v. *Peabody Coal Co.*, Cir. 7, 142 F. (2) 784; *Shepler* v. *Crucible Fuel Co.*, Cir. 3, 140 F. (2) 371.

[fol. 84] In the absence of any attempt to circumvent the statute we might agree. But here the court found on substantial evidence that the appellees were employed by the appellants after April 20, 1942, at fixed weekly rates of compensation and that the "purpose of the agreement formula for determining the hourly rates of those employees who were regularly employed more than 40 hours per week was to reduce the hourly rate sufficiently so the payment of time and a half for overtime would not bring the total weekly earnings substantially above the weekly rates set by the agreement." The effect of the use of the formula was to make any increase in the employees pay above the regular weekly rate depend not upon overtime in excess of forty hours but upon overtime computed only in excess of whatever workweek the parties might agree upon. As was demonstrated in this record, that involved mathematical computations which in most instances would if the formula was strictly adhered to, not result in the exact weekly pay agreed upon. The slight discrepancies were then simply ignored and the agreed weekly rate was always paid instead of what would be due under the formula. The result was employment at whatever regular workweek and at whatever regular weekly wage the parties saw fit to agree upon which remained constant regardless of work in excess of forty hours per week which was not in excess of the number of hours in the agreed workweek. While the parties were free to agree upon any regular workweek and fix or compute the regular rate of payment therefore in any way they desired provided the statutory minimum hourly wage was paid, *United States* v. *Rosenwasser*, 323 U. S. 360, "this freedom of contract does not include the right to compute the regular rate in a wholly unrealistic and artificial manner so as to negate the statutory purposes." *Walling* v. *Helmerich & Payne, Inc.*, 323 U. S. 37,

[fol. 85] 42. It does negate the statutory purposes to base employment upon a regular unvarying weekly wage for a workweek in excess of the statutory minimum hours and then merely break that down into so-called regular and overtime hourly rates by means of a formula so the weekly wage actually definitely fixed is seemingly transferred into an hourly wage rate. That amounts but to an illusion of overtime pay after a forty hour workweek where there can be no increase in pay per workweek because of overtime work unless there is overtime not only in excess of the statutory workweek but also in excess of the agreed workweek. See *Walling* v. *Youngerman-Reynolds Hardwood Co., Inc.*, 325 U. S. 419, *Adams* v. *Union Dime Sav. Bank*, Cir 2, 144 F. (2) 290; *Watkins v. Hudson Coal Co.*, Cir. 3, 151 F. (2d) 311. The attempt to make the contract consummated in September retroactive to April 20 but highlights the illusion that the new contract was more than a continuation of the old wage arrangement which did not comply with the statute. The right to overtime pay which had already accrued to these appellees could not thus be waived. *Brooklyn Bank* v. *O'Neil*, 324 U. S. 697.

Affirmed.

[fol. 86] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 17th day of June one thousand nine hundred and forty-six.

Present: Hon. Harrie B. Chase, Hon. Charles E. Clark, Hon. Jerome N. Frank, Circuit Judges.

FRANK ASSELTA, et al., Plaintiffs-Appellees,

v.

149 MADISON AVENUE CORP., and another, Defendants-Appellants

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 87] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Frank Asselta, et al., v. 149 Madison Ave. Corp., and ano. Judgment, United States Circuit Court of Appeals, Second Circuit. Filed June 17, 1946, A. M. Bell, Clerk.

[fol. 88] UNITED STATES OF AMERICA, SOUTHERN DISTRICT OF NEW YORK

I, Alexander M. Bell, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 87, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of

FRANK ASSELTA, et al., Plaintiffs-Appellees,

against

149 MADISON AVENUE CORP., and another, Defendants-Appellants

as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 1st day of July, in the year of our Lord one thousand nine hundred and forty-six, and of the Independence of the said United States the one hundred and seventieth.

Alexander M. Bell, Clerk. (Seal.)

[fol. 89] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. 497

ORDER ALLOWING CERTIORARI—Filed December 9, 1946

A petition for rehearing having been submitted in this case,

Upon consideration thereof, it is ordered by this Court that the petition for rehearing be, and the same is hereby, granted.

And it is further ordered that the order denying certiorari enterer October 28, 1946, be, and the same is hereby, vacated; and that the petition for writ of certiorari herein be, and the same is hereby, granted. The case is transferred to the summary docket and assigned for argument immediately following No. 564, which case is assigned for argument immediately following No. 74.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

N 407

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

149 MADISON AVENUE CORP. and WILLIAMS & CO., INC.,

Petitioners,

against

FRANK ASSEETA, CAMILO DEL RIO, JOSEPH McARDLE, SAMUEL MANNE, CORNELIUS McCOLE, BURTON PETLESON, FRANK RODRIGUEZ, JAMES TORRA, JOHN H. BERGER and GEORGE BERGER,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

WALTER GORDON MERRITT,
ROBERT R. BRUCE,
Counsel for Petitioner.

JOHN J. BOYLE,
of Counsel.

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New York Sun, January 10, 1946, p. 12 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

149 MADISON AVENUE CORP. and WILLIAMS & CO., INC.,

Petitioners,

against

FRANK ASSELTA, CAMILO DEL RIO, JOSEPH McARDLE, SAMUEL MANNE, CORNELIUS McCOLE, BURTON PETERSON, FRANK RODRIGUEZ, JAMES TORRA, JOHN H. BERGER and GEORGE BERGER,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Your petitioners, 149 MADISON AVENUE CORP. and WILLIAMS & CO., INC., respectfully pray that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit entered in the above case on June 17, 1946, which affirmed a judgment in favor of respondents.

Opinions Below

The opinion of the District Court (R. 184-203) is reported at 65 F. Supp. 385. The opinion of the Circuit Court of Appeals (R. pp. 81-85) is reported in 156 F. 2d 139.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on June 17, 1946 (R. p. 86). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

Question Presented

Pursuant to a Directive Order of the National War Labor Board made on July 29, 1942, an employers' association of which petitioners are members and a labor union of which respondents are members entered into a collective bargaining agreement (known as the National War Labor Board Agreement) fixing terms and conditions of employment for a large number of loft and office buildings, as well as apartments, in New York City, for the period April 21, 1942 to April 20, 1945. The Directive Order of the Board and the resultant collective agreement were made subsequent to the landmark decision of this Court in *Kirschbaum* v. *Walling*, 316 U. S. 517, holding the Fair Labor Standards Act applicable to loft buildings tenanted by manufacturers producing goods for interstate commerce. Accordingly the employers and the union intended, as the War Labor Board recognized, to bring the wage and hour provisions of their agreement applicable to building service employees in loft and office buildings into compliance with that Act. For a regular workweek of 46 hours the agreement provided weekly earnings or "take home" pay which included all overtime compensation for the regular workweek. Hourly rates used in determining compensation when an employee worked less than or more than the regular workweek of 46 hours, were calculated by dividing the earnings for the regular workweek, by 49, being the sum of the hours in the regular workweek, *i. e.*, 46, and half the hours regularly worked

in excess of 40 per week, *i. e.*, 3, a formula which is nothing more than a restatement of the Act's overtime requirements. The agreement provided that it should not be construed to lower the hourly rate presently received by any employee (Pl. Ex. 1, Art. III, par. 2, p. 6). The Trial Court found that petitioners applied the hourly rates derived from the formula in "all situations" (R. 200).

The question presented is whether the method of calculating the regular hourly rate and the overtime rate provided by the National War Labor Board Agreement conforms to the requirements of Sec. 7(a) of the Fair Labor Standards Act of 1938 (Opinion of Circuit Court, R. p. 82).

More broadly viewed, the question is whether under the Act employers and employees can ever effectively agree what the weekly earnings or "take home" pay, inclusive of overtime, shall be for a regular workweek in excess of 40 hours, reducible by a clear formula to an hourly rate for the purpose of determining compensation when the hours worked are less than or more than the regular workweek; or whether the *Missel* formula ("Wage divided by hours equals regular rate", 316 U. S. 572, 580) is mandatory despite the contrary agreement and practice of the parties.

Statute Involved

The pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C., Secs. 201, *et seq.*) are as follows:

> SEC. 7 (a). No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—
>
> * * * * * *

(3) For a workweek longer than forty hours after the expiration of the second year from * * * (the effective) date (of this section), unless such employee receives compensation for his employment in excess of the hours above specified at a rate of not less than one and one-half times the regular rate at which he is employed.

Statement

(a) *Preliminary*

Petitioners, owner and managing agent, employed respondents in a loft building in New York City. It is conceded that the work performed by respondents is covered by the Act (R. 220). While the original complaint covered the period October 24, 1928 to April 20, 1942, by amendment at the trial, the period was extended to December 10, 1943, being the date the action was commenced. The period which is now involved is April 21, 1942 to December 10, 1943, since all issues prior thereto have become moot (R. 214-225).

There was no oral testimony with respect to the phase of the case now involved. The facts with respect to the issues are found in two stipulations (R. 119-135, 1[illegible]-159) and five exhibits which are bound separately and handed up to this Court pursuant to agreement between the attorneys (R. 115-117).

It is stipulated that for the period, April 21, 1942 to December 10, 1943, respondents "were employed and paid in accordance with the terms and conditions of employment provided in a collective bargaining agreement known as the National War Labor Board Agreement" between Realty Advisory Board on Labor Relations, Inc., on behalf of the various signatory employers, and Local 32B, Building Service Employees International Union, A. F. of L., on behalf of the employees (Pl. Ex. 2, R. 120-122). That agreement fixed a regular workweek for employees,

other than watchmen, of 46 hours; for watchmen, of 54 hours. It also provided for weekly earnings for all workmen employed thereunder for the stipulated regular workweek, and stated that "it is the intention of the parties that the wages paid, as provided for in this agreement, * * * shall constitute full payment for services rendered under this agreement * * *" (Pl. Ex. 1, Article III, par. 6, p. 7).

In addition to providing for earnings for the regular workweek, the NWLB Agreement provided a method or "formula" for determining hourly rates which governed the payment of non-overtime and overtime where the hours worked were less than or more than the agreed regular workweek. Express hourly rates were also fixed for those employees having no regular workweek. It expressly provided an overtime rate of "at least time and one-half" for all hours worked in excess of 40 hours per week. Employees, other than watchmen, working more than 46 hours per week or more than 9½ hours per day, are paid "an overtime rate of time and three-quarters" for such overtime. Watchmen working more than 54 hours per week or more than 11½ hours per day, are paid double time (Pl. Ex. 1, "Hours And Hourly Rates", pp. 27 to 30).

It is clear, therefore, that the regular weekly earnings or wages directed by the War Labor Board and incorporated by the parties in their agreement included full payment for all overtime embraced within the regular workweek of 46 or 54 hours, as the case might be, and not merely payment for non-overtime hours. Failure to grasp this fact was the source of the basic legal error in the Trial Court's decision. The Trial Court in assuming (R. 198-199) that plaintiffs were employed for a fixed workweek at a fixed weekly wage, ignored the fact that the so-called fixed wage included overtime and was intended to be full compensation for such a workweek.

(b) *Background of Agreement*

Since 1934, a substantial number of owners of loft, office and apartment buildings, in the Borough of Manhattan have bargained collectively with Local 32B regarding the terms and conditions of employment of their building service employees. A brief history of this relationship and a description of the resulting agreements is set forth in the Report and Recommendations of the Mediation Panel of the National War Labor Board (Pl. Ex. 4, pp. 4 to 17 inclusive). More than 2,200 separate buildings, including approximately 700 loft buildings, have been involved. In these negotiations, there have been two distinct sets of agreements; one set (McGrady Agreement, February 4, 1939 to February 3, 1942; Meyer Agreement, February 4, 1942 to February 3, 1945) known as the Garment Center Agreements, between Local 32B and the Midtown Realty Association, Inc. and the Penn Zone Association, Inc., covering loft and office buildings in the Garment Area; the other (Sloan Agreement, April 24, 1939 to April 20, 1942; National War Labor Board Agreement, April 21, 1942 to April 20, 1945) between Local 32B and the Realty Advisory Board on Labor Relations, Inc., covering loft, office and apartment buildings elsewhere in Manhattan. The pattern of the two sets of agreements was naturally similar.

During the period April 24, 1939 to April 20, 1942, the respondents were employed pursuant to the Sloan Agreement (Pl. Ex. 2, R. 126; Pl. Ex. 3). Weekly wages of $24 for a 47-hour week (watchmen, 59 hours) were established for Class "C" loft buildings, that being the classification of the building in controversy (Pl. Ex. 3, pp. 11 to 14). The Sloan Award, following an interim arbitration of wages and hours called for by the basic agreement, resulted in the raising of the weekly wage for Class "C" lofts to $25 per week, effective October 20, 1940 (Pl. Ex. 4, pp. 12-13).

The Sloan Agreement contained no provision, express or implied, that the regular weekly wage included overtime and there was no provision for determining hourly rates. The only rates mentioned were weekly rates for various jobs and for classes of buildings. There was no provision for overtime between 40 hours per week and the regular workweek of 47 hours. The Sloan Agreement as well as the McGrady Agreement in the Garment Center were negotiated in 1939, at a time when both laymen and lawyers, entertained no serious thought that building service employees of independent landlords were "engaged in commerce or in the production of goods for commerce" within the meaning of the Fair Labor Standards Act. See, *Fleming* v. *Arsenal Building Corporation*, 38 F. Supp. 207, Woolsey, J. (S. D. N. Y., April 11, 1941); *Killingbeck* v. *Garment Center Capitol, Inc.*, 259 App. Div. 691 (1st Dept. June 7, 1940), leave to appeal denied, 259 App. Div. 1076, 284 N. Y. 818.

The story of the tidal wave of retroactive liabilities which engulfed loft building owners and managing agents in New York City and throughout the nation after this Court decided *Kirschbaum* v. *Walling*, 316 U. S. 517, is well known.[4]

The Sloan Agreement provided (R. Ex. 3, p. 21) that by February 1, 1942 the parties would enter into negotiations for a new agreement. Meanwhile the decision of the Circuit Court of Appeals for the Second Circuit in *Flem-*

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[4] *Adams* v. *Union Dime Savings Bank*, 53 F. Supp. 782, aff'd 144 F. 2d 290 (C. C. A. 2, 1944), certiorari denied 323 U. S. 751, October 16, 1944; *O'Neil* v. *Brooklyn Savings Bank*, 267 App. Div. 317 (1st Dept., 1943), aff'd 293 N. Y. 666, aff'd 324 U. S. 697; *Gangi* v. *D. A. Schulte, Inc.*, 53 F. Supp. 844, reversed 150 F. 2d 694, aff'd U. S. , 90 Law ed. (Adv. op.) 873; *Borden Co.* v. *Borella*, 325 U. S. 679.

The estimated liability of building owners in New York City if the decision in the present case stands, exceeds $10,000,000. New York Sun, January 10, 1946, p. 12.

ing v. *Arsenal Building Corporation*, 125 F. 2d 278, entered the picture on December 30, 1941. This involved a building in the Garment Center under the Meyer Agreement which was due to expire on February 3, 1942. As a result the Union and the two Associations, in the Garment Area, after an arbitration before Mr. Arthur S. Meyer, Chairman of the New York State Mediation Board, entered into the Meyer Agreement, covering the period February 4, 1942 to February 3, 1945, which for the first time in the bargaining between Local 32B and the owners, fixed hourly rates governing the employment of all classifications of employees (Pl. Ex. 4, pp. 16-17; 33-34; 70-72).

Local 32B and the Realty Board commenced negotiation in March, 1942 for a new agreement to succeed the Sloan Agreement and the matter ultimately went before the National War Labor Board in Washington, D. C. (Pl. Ex. 4, pp. 6, *et seq.*). The Panel's Report which the Board adopted, states at pages 33 to 34:

> "It was understood at the hearing that if the Board set hours for office and lofts above the 40-hour maximum demanded by the Union, the parties would adopt the formulae of the Meyer Agreement for the calculation of hourly rates, and the fixing of overtime. These formulae were introduced because of the prospective application to loft buildings of the Fair Labor Standards Act. We quote and explain them in Appendix B. As they have been accepted in principle by the parties, we believe they should be incorporated into the present contract."

At the hearing before the Board it was understood and agreed that the new wages and hourly rates agreed upon by the parties or ordered by the Board, would be retroactive to April 21, 1942, when the Sloan Agreement expired (Pl. Ex. 4, p. 49; Pl. Ex. 2, R. 133).

(c) *Application of Hourly Rates under the Agreement*

Pursuant to the Directive Order (Pl. Ex. 4), the Union and the Realty Advisory Board on Labor Relations, Inc., on September 1, 1942, signed the NWLB Agreement. This agreement (Pl. Ex. 1, Article VIII, p. 12), provides that the agreement is to take effect September 1, 1942, except that the wages, hourly rate formulae and the hourly wage rates provided for in the agreement, shall be effective retroactively to April 21, 1942, and that the formulae and the hourly rates for the period, April 21 to September 1, 1942, shall be computed on the basis of the hours provided in the Sloan Agreement (which, of course, had already been worked). This merely carried out the previous agreement of the parties and the suggestion of the Board in line with normal and sound practice in such matters.

Pursuant to the retroactive clause in the agreement, the respondents who were members of the Union were paid the retroactive increase (Pl. Ex. 6—retroactive payroll for period, April 21, 1942 to September 5, 1942, p. 35 of Exhibit Volume). All work performed from April 21, 1942 to September 5, 1942 was performed in anticipation of and subject to the new wages of which the hourly rates were an integral part. Obviously, the new hourly rates for this period could not be reflected on the current payrolls; but the rates existed and were paid nevertheless.

The Circuit Court's comment (R. p. 85) on this retroactive arrangement was unwarranted in fact or in law. Said the Court: "The attempt to make the contract consummated in September retroactive to April 20 but highlights the illusion that the new contract was more than a continuation of the old wage arrangement which did not comply with the statute. The right to overtime pay which had already accrued to these appellees could not thus be waived." Since overtime was worked during

this period, respondents were entitled to payment therefor in accordance with the Act. But the liability had not yet accrued since the wage rates governing employment for this period were still in negotiation and overtime could not possibly have been computed. "But Section 7 (a) does not require the impossible. If the correct compensation cannot be determined until some time after the regular pay period, the employer is not thereby excused from making the proper computation and payment. Section 7 (a) requires only that the employees receive a 50% premium as soon as convenient or practicable under the circumstances." *Walling* v. *Harnischfeger Corp.*, 325 U. S. 427, 432.

Hence the problem for this retroactive period during which the wage and hour issues were being settled, is no different than for the period after the agreement was signed: Did the National War Labor Board Agreement properly compute the regular hourly and overtime rates?

Nor does the retroactive application of the new agreement to cover the negotiating period show a continuation of the old arrangement. Such a conclusion ignores the fundamental transition from an agreement (the Sloan Agreement) which merely fixed non-overtime wages for a fixed workweek of 47 hours without any provision for overtime within the 47 hour workweek (excepting daily overtime which was paid after 9½ hours per day) and an agreement (the NWLB Agreement) which provided for total earnings inclusive of overtime for the regular workweek in excess of the weekly wage under the Sloan Agreement, and expressly required overtime after 40 hours per week and 9½ hours per day on the basis of the hourly rate derived from an express formula.

The formula of the NWLB Agreement (following that of the Meyer Agreement) for determining the hourly rates of the respondents and the provisions for payment of wages, whether overtime or non-overtime, on the basis

of these rates, is set forth in detail at pages 27 to 30 of the Agreement (Pl. Ex. 1). The essence of the formula fixing the rates is as follows:

> "The hourly rates for those regularly employed more than forty (40) hours per week shall be determined by dividing their weekly earnings by the number of hours employed plus one-half of the number of hours actually employed in excess of forty (40) hours."

At the moment the agreement became effective, there was immediately fixed for each respondent a definite hourly rate: the quotient of the employee's prospective earnings for his regular workweek divided by 50.5 (hours regularly employed, or 47, plus one-half the number of hours regularly employed in excess of 40 hours, or 3.5, equals 50.5).[2] Thus the hourly rate of the respondent Peterson at the effective date of the agreement was $.544, being the quotient of $27.50, his prospective earnings for a regular workweek under the NWLB Agreement and 50.5. As demonstrated in detail later, this hourly rate was constant and determined his wages in all given situations, whether he worked less hours or more hours than his regular workweek. Peterson's hourly rate, as well as those of the other employees, thus fixed at the effective date of the agreement, changed only when his regular workweek was shortened or when his prospective earnings for his regular workweek were increased pursuant to the agreement. Such a change of rate occurred when Peterson's regular workweek changed from 47 hours per week to 46 hours per week beginning August 10, 1942, in anticipation of the signing of the NWLB Agreement. His rate then became $.561 per hour ($27.50, prospective earnings, divided by 49). His rate changed

[2] The divisor for watchmen, such as respondent McCole, whose regular workweek under the agreement was 54 hours, was 61 (54 plus one-half the hours in excess of 40, or 7, equals 61).

again as of April 21, 1943 when, pursuant to an interim arbitration award under Article III, par. 3, page 6 of the agreement, his earnings for a regular workweek were increased to $28.90. His rate then became $.589 ($28.90 divided by 49).

The individual hourly rates resulting from the NWLB Agreement were incorporated into the payrolls which the respondents signed each week without question of their correctness or validity. The payrolls show that these rates were actually applied in determining respondents' pay whether their hours exceeded or were less than the regular workweek. The Trial Court so found (R. 200-201).

Respondent members of the Union were paid retroactively pursuant to Article VIII (Pl. Ex. 1, p. 12) of the agreement. Each received an increase of $2.50 over his weekly pay under the Sloan Agreement but on the understanding that the newly agreed weekly earnings included overtime inherent in the regular workweek. The formula was then applied on the basis of the hours under the Sloan Agreement (47 hours) and the prospective earnings of $27.50 ($25 plus $2.50 increase). To illustrate, respondent Peterson, under the Sloan Agreement, worked 47 hours for a weekly wage of $25. Under the retroactive clause of the NWLB Agreement, Peterson received a $2.50 increase, bringing his earnings to $27.50—$27.50 divided by 50.5 (47 plus 3.5 hours) pursuant to the formula, equals $.544. 40 times .544 = $21.78 plus 7 times .816 (time and one-half) = $5.72, or $27.50. Respondents therefore were entitled to a retroactive payment of $2.50 for each of the regular workweeks actually worked during the period, April 21, 1942 to September 5, 1942 which they received (Pl. Ex. 6—retroactive payroll for period, April 21, 1942 to September 5, 1942, page 35 of Exhibit Volume).

For the period, September 20, 1942, to December 10, 1943, each respondent was paid on the basis of the hourly

rate appearing on the payroll records (rates for period April 21, 1943 to October 29, 1943 were later subject to a retroactive adjustment). Each weekly payroll shows the number of hours worked each day, the number of non-overtime hours (40 or less), the hourly rate, wages paid for non-overtime hours, the number of overtime hours, the basis upon which the overtime hours were compensated for, *i. e.*, 150% of the hourly rate for hours between 40 and 46 and 175% of the hourly rate for hours in excess of 46, or in excess of 9½ per day, the total number of hours worked each week and the total pay (Pl. Ex. 6, pp. 36-103 of Exhibit Volume).

A schedule is annexed to this petition as "Appendix A", showing the hourly rate (adjusted, of course, to show the two retroactive increases) for each respondent for the period April 21, 1942 to December 10, 1943. For the period, April 21, 1942 to September 5, 1942, the hourly rates were determined by the formula, using the wage increase under the NWLB Agreement plus the wages under the Sloan Agreement and the hours under the Sloan Agreement. For the period, September 20, 1942 to April 20, 1943, the hourly rates are those shown on the payroll records. For the period, April 21, 1943 to October 29, 1943, the hourly rates are those shown on the payrolls plus the increase given in October, 1943, retroactive to April 21, 1943 (Pl. Ex. 6, p. 97 of Exhibit Volume). For the period, October 30, 1943 to December 10, 1943, the hourly rates are those shown on the payroll records.

Respondents were compensated on the basis of these hourly rates for all time worked by them, whether the hours exceeded or were less than 40 hours per week.

For example, respondent Peterson was absent for inexcusable cause for three days or 23 hours during the week February 28, 1943 to March 6, 1943 (Defs. Ex. B, par. 2(b) and (c), R. 143-145). He therefore worked 23 hours and was paid $12.90 (23 hours x .561, hourly rate; see Pl. Ex. 6, p. 60 of Exhibit Volume).

It does not appear that Peterson or any other respondent was ever absent inexcusably for only part of a day during any workweek. Assuming, however, for the period August 10, 1942 to April 20, 1943 when Peterson's hourly rate was .561, that he worked only 42 hours in a given week and was inexcusably absent for 4 hours, his pay would have been computed as follows: 40 hours (regular time) x .561 (regular hourly rate) or $22.44 plus 2 hours (overtime) x .843 (overtime rate) or $1.68, making a total of $24.12 (Defs. Ex. B, R. 143).

The method of treating excusable absences is set forth in Defendants' Exhibit B, par. 2(a) (R. 141-142). During the week of December 13 to 19, 1942, Peterson worked 30 hours, being absent for excusable cause two days or 16 hours. He was paid $13.44 (24 hours x .561) plus $5.06 (6 hours x .843) or a total of $18.50 (see Pl. Ex. 6, p. 48 of Exhibit Volume). Pursuant to the Agreement, Section III, par. 5 (i), p. 29, there was deducted from Peterson's earnings, $9.00 (16 hours x .561) for these excusable absences.

Pursuant to the agreement, employees, other than watchmen, working more than 46 hours per week were paid an overtime rate of time and three-quarters. During the week of January 24, 1943 to January 30, 1943, Peterson worked six days for a total of 52 hours. For that week he received $22.44 (40 hours x .561) plus $5.06 (6 hours x .843) plus $5.88 (6 hours over 46 hours x .98, time and three-quarters) or a total of $33.38 (see Pl. Ex. 6, p. 55 of Exhibit Volume).

(d) *Analysis of Opinions Below*

While the Trial Court found as a fact that petitioners "here actually applied in all situations the hourly rates so derived" (*i. e.*, from the formula), he ruled that: "The manner in which the hourly rate is determined and not the application of an hourly rate is the test" (R. 200-201). The formula was held ineffective under Section 7(a) because: "The hourly rates derived by the use of the formula bore no relation to the regular rate of the

workweek as defined in *Overnight Motor Co.* v. *Missel*"[3] (R. 198).

In response to petitioners' attack on the Trial Court's ruling and their argument that the *Missel* formula has no application where the parties have agreed upon weekly earnings, inclusive of overtime, for a fixed regular workweek, and have also agreed upon a formula for allocating those earnings to non-overtime and overtime which is no more than a restatement of the Act's requirements, the Circuit Court said: "In the absence of any attempt to circumvent the statute we might agree" (R. p. 84). But the Circuit Court's holding of circumvention is based on nothing more than the District Court's findings (No. 18 and No. 19, R. 171-172) as to the purpose of the formula which are a repetition of the War Labor Board's description of how the formula operates.

It begs the question to say that the formula is bad because it reduces the hourly rate below what it would be if computed in the ordinary way (*i. e.*, the *Missel* formula that hourly rate equals weekly wages divided by weekly hours) "so the payment of time and a half for overtime would not bring the total weekly earnings substantially above the weekly rates set by the agreement." The question is whether anything in the Act makes the ordinary way of computation mandatory where the parties have made the type of agreement here involved.

The Circuit Court's holding that the NWLB Agreement "does negate the statutory purposes" is also based upon total disregard of the fact, as found by the Trial Court,

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[3] While the Trial Judge apparently read the formula as calling for a variable weekly rate thus explaning his comment that: "In practice the formula was not strictly followed" (R. 197), he nevertheless found that the formula rates had been applied. Between April 20, 1942 and December 10, 1943, the hourly rates remained fixed except when the agreed weekly earnings or agreed regular workweek were changed pursuant to the agreement. This practice reflected the understanding of the parties and the War Labor Board (Appendix B, Pl. Ex. 1, pp. 70-71).

that the formula rates were "actually applied in all situations." This is manifest from the Court's reference to a fixed weekly wage "seemingly transferred into an hourly rate" and to "an illusion of overtime pay after a forty hour workweek where there can be no increase in pay per workweek because of overtime unless there is overtime not only in excess of the statutory workweek but also in excess of the agreed workweek."[4] There is nothing "seeming" or "illusionary" about hourly rates that are actually applied.

The District Court misapprehended the true bearing of the more recent decisions of this Court dealing with Section 7(a) of the Act. The Circuit Court ignored the plain facts of the case.

Reasons for Granting the Writ

1. This case presents an important Federal question which has not been, but should be, settled by this Court.

While the decisions of the courts below are at odds with recent decisions of this Court because they fail to give effect to an hourly rate formula that meets all the tests prescribed by those cases, the instant case plainly presents a new problem.

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[4] The Circuit Court attempts to bolster its argument that the regular rate was a fixed weekly wage by reference to certain alleged payroll discrepancies not mentioned by the District Court. "The slight discrepancies were then simply ignored and the agreed weekly rate was always paid instead of what would be due under the formula" (R. *p. 84*). Obviously where an employee worked his regular workweek, the amount due under the formula was necessarily the agreed weekly earnings, which included overtime. The Circuit Court apparently refers to the fact that hourly rates and overtime rates derived from the formula were only carried to one decimal and therefore the extensions of these rates were not accurate to the exact cent. However, the existing decisions confirm petitioners' practice of carrying the hourly and overtime rates to the nearest tenth of a cent per hour. *Snyder* v. *Wessner*, 55 F. Supp. 971, 976; *Anderson* v. *Federal Cartridge Corp.*, 62 F. Supp. 775, 785.

Here employers and employees have agreed upon "take home" earnings, including overtime, for a specified regular workweek and have also agreed upon a method for allocating those earnings between non-overtime and overtime to determine compensation when an employee works less hours or more hours than the normal workweek.

Basically, the issue is whether employers and employees can in any circumstance state in their wage agreements weekly earnings for a workweek in excess of 40 hours without the employers running afoul of liability under the Act. For under the holding of the courts below, the statement of weekly earnings, even though intended by all parties to include straight time for 40 hours and time and a half for hours worked in excess thereof, is fruitless. The Act, according to the courts below, requires division of the agreed weekly earnings by the number of hours worked in order to arrive at the hourly rate. The necessary result is that, under this theory, the required payments for a workweek in excess of 40 hours will invariably exceed the amount agreed upon. And the process is an infinite one, for each time new weekly earnings are agreed upon, the hourly rate must again be computed by the *Missel* method, and a higher weekly payment made.

One fallacy of the Circuit Court rests on its premise that the test of whether an hourly rate is fictitious, and hence invalid, is whether an employee must work more than the regular workweek in order to earn an amount in excess of the agreed weekly earnings. Obviously, this cannot be the test if agreed weekly earnings, inclusive of overtime, are ever valid. Rather the test is whether the hourly rate agreed upon is in fact the rate which determines the payments to the employees. That test has been met in this case.[5]

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[5] This point is developed in point 3 of "Reasons", p. 21 below.

Brief reference to the facts of the five "hourly rate" cases so far decided by this Court shows that the type of wage agreement here involved has not been tested under the Act by this Court. In *Walling* v. *Belo*, 316 U. S. 624, the employees worked an irregular workweek and received a weekly guarantee. While, as the dissenting opinion points out (p. 637), the stated hourly rate had no demonstrable effect in determining compensation until an employee exceeded 54½ hours of work per week, this Court, by a divided vote, upheld the agreement. In *Overnight Transportation Co.* v. *Missel*, 316 U. S. 572, decided the same day as the *Belo* case, the employees also worked an irregular workweek for a fixed weekly wage. There was no stated hourly rate and no agreement that the weekly wage included overtime. The employer urged that such an agreement should be implied. This Court pointed out that: "Implication cannot mend a contract so deficient in complying with the law," the deficiencies being that there was no limit on the hours which the employer could have required the employee to work for the weekly wage and no provision for additional pay if the hours worked required minimum compensation greater than the fixed wage.

In *Walling* v. *Helmerich & Payne, Inc.*, 323 U. S. 37, the employee was paid by the day and the employer made an arbitrary division of the normal work day for purposes of computing overtime. Thus the stated hourly rate relied upon under Section 7, bore no relation to the compensation paid for the first 40 hours worked. Indeed, as applied to employees whose normal work day was 12 hours, the stated rate had no operative effect until the employees exceeded 84 hours of work per week. In *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, and *Walling* v. *Harnischfeger Corp.*, 325 U. S. 427, while the employees were employed and paid by the hour at stated rates, they were also paid on a piece-work and incentive basis. Because of the incentive earnings,

stated hourly rates in both cases were wholly inoperative in determining the actual compensation paid.

The question presented as to whether or not the *Missel* formula is mandatory, despite the contrary agreement and practice of the parties in this case, is still an open question and has been so regarded both by this Court and an able commentator on its decisions under the Act.[6]

2. The decision below is in conflict with the decisions of the Seventh Circuit Court of Appeals in *Bergschneider* v. *Peabody Coal Co.*, 142 F. 2d 784 and the Third Circuit Court in *Shepler* v. *Crucible Fuel Co.*, 140 F. 2d 371. This Court has recently granted certiorari in *Walling* v. *Halliburton Oil Well Cementing Co.*, 152 F. 2d 622, Docket No. 1018, apparently because of a conflict among Circuits on a related question under Section 7 of the Act.

The opinions in both the *Bergschneider* and *Shepler* cases disclose that the stated hourly rates were computed as the quotient of agreed weekly earnings inclusive of overtime

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[6] "We, of course, express no opinion as to the proper computation of the regular rate under other circumstances. Nor do we intend to indicate that the formula we have used as satisfying the statutory requirements, (*i. e.*, the *Missel* formula) is the only one which respondent could adopt as complying with them." *Walling* v. *Hemerich & Payne*, footnote, p. 41.

"There was no agreement providing for an hourly rate of pay or that the weekly salary included additional compensation for overtime hours" *Warren-Bradshaw Co.* v. *Hall*, 317 U. S. 88, 93. While the *Missel* formula was there held to govern the determination of the hourly rate, the quoted language certainly suggests that it would have no application to the type of agreement here involved.

"The result (referring to *Walling* v. *Harnischfeger Corp.*) is consistent with the *Missel* case, which may be regarded as holding that, *at least in the absence of some clear provision to the contrary in the contract*, the regular rate should be ascertained by dividing total weekly earnings by hours worked." Dodd, "The Supreme Court and Fair Labor Standards, 1941-1945", 59 Harvard L. Rev. 321, 363. (Italics ours.)

[a] It would be difficult to draft a clearer "provision to the contrary" than the formula of the NWLB Agreement.

and the sum of the agreed weekly hours plus one-half the hours in excess of the statutory workweek. Certainly no sound distinction rests in the fact that there the hourly rate was expressly stated and here it had to be computed, where the computing formula is identical. Yet in both those cases the Circuit Courts found no occasion to strike down the agreements as violative of the purposes of the Act.[7]

Both courts relied on *Walling* v. *Belo*, 316 U. S. 624. While the Ninth Circuit Court of Appeals has recently followed the *Belo* opinion in *Walling* v. *Halliburton Oil Well Cementing Company*, 152 F. 2d 622, the Administrator's petition in that case, which was granted, notes a tendency in other circuits, including the Second, to limit that ruling to its precise facts. Moreover, it would appear from this Court's action in granting the petition that the Court is prepared to reexamine *Belo* and to give fresh consideration to the problems of how the "regular rate" shall be computed under Section 7(a).

Petitioners did not rely upon the *Belo* case in the Circuit Court and do not emphasize it now as a reason for granting the writ in this case. Whatever the reach of the *Belo* opinion and whatever limitations have been or may be placed upon it by the several circuits or by this Court, petitioners stand on a different and sounder footing. In *Belo* it is not easy to demonstrate that the stated hourly rate had any demonstrable effect until the employee had worked sufficient hours (54½) to earn his weekly guarantee. In our case the hourly rate derived from the

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[7] It may be claimed that a more recent case in the Third Circuit, *Watkins* v. *Hudson Coal Company*, 151 F. 2d 311, rejects a departure from the *Shepler* case. However, in the *Watkins* case, the Court found that the hourly rates derived from the formula had not been applied and were therefore fictitious (see footnote 8 at page 25 above). The formula in that case was also held bad because the rate derived did not "bear a real relation to actual earnings". This is merely another way of saying that a formula rate is invalid unless it is the rate actually paid for the non-overtime workweek, which was true of the formula rates both in the *Shepler* and the instant case.

formula was actually applied, as the District Court found, in all situations below as well as beyond the agreed workweek.

If, as we believe, the decision of the Second Circuit below conflicts with decisions of other circuits relying mainly on the *Belo* case, and if *Belo* is reexamined in the *Halliburton* case, as necessarily it must be, then it is appropriate that this case presenting a related, but not identical, problem under Section 7, should also be reviewed.

The necessity for review to clarify a somewhat confused state of decisions under Section 7(a) by the Circuit Courts and to avoid needless litigation of cases involving similar issues, is no less urgent here than in the *Halliburton* case.

3. The courts below have decided a Federal question in a way which conflicts with the decisions of this Court in *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, *Walling* v. *Harnischfeger Corp.*, 325 U. S. 427 and *Walling* v. *Helmerich & Payne, Inc.*, 323 U. S. 37.

These cases reflect a common principle emphasizing realities rather than form. The "regular rate" under Section 7(a) must be a real rate, not a fictitious one. Employers and employees are free by collective bargaining to establish the "regular rate" at any point at or above the minimum prescribed by Section 6 subject to one condition:

> "The regular rate by its very nature must reflect all payments which the parties have agreed shall be received regularly during the workweek, exclusive of overtime payments."
>
> *Walling* v. *Youngerman-Reynolds Hardwood Co.*, p. 424.

"* * * we look not to contract nomenclature but to the actual payments, exclusive of those paid for overtime, which the parties have agreed shall be paid during each workweek."

Walling v. *Harnischfeger Corp.*, p. 430.

"While the words 'regular rate' are not defined in the Act, they obviously mean the hourly rate actually paid for the normal, non-overtime workweek."

Walling v. *Helmerich & Payne*, p. 40.

If the regular rate were not computed so as to reflect all payments regularly made for non-overtime work, the statutory purposes would obviously be frustrated as pointed out by Justice Murphy in *Walling* v. *Harnischfeger Corp.* at page 430:

"To compute overtime compensation from the lower and unreceived rate is not only unrealistic but is destructive of the legislative intent. A full 50% increase in labor costs and a full 50% wage premium, which were meant to flow from the operation of Section 7(a), are impossible of achievement under such a computation."

Close reading of the opinions of both courts below discloses that the District Court and the Circuit Court do not agree as to their reasons for condemning the NWLB Agreement. The Trial Judge (R. 198-200) arbitrarily treated the weekly earnings for the regular workweek as a regular weekly wage for non-overtime hours and applied the formula of the *Missel* case, 316 U. S. 572 ("Wage divided by hours equals regular rate") as the only lawful method of computing the hourly rate. That treatment was clearly erroneous because it disregarded the agreement between the parties that the weekly earnings included all overtime inherent in the regular workweek. It also disregarded the fact that the hourly rates

derived from the formula were the rates actually paid for hours less than or more than the regular workweek, as the Trial Court found.

Under the decisions of this Court referred to above, the regular rate is computed from the regular weekly payments, "exclusive of overtime." Allocation of non-overtime earnings and overtime is precisely the function of the formula. In the formula the hourly rate (x) necessarily reflects all non-overtime payments for the regular workweek.

X (hourly rate) = earnings (including overtime) ÷ 49 (regular workweek plus half the hours exceeding 40)

Earnings (49x) = 46 X + 3 X

49 X — 3 X = 46 X

46 X (non-overtime earnings) ÷ 46 (regular workweek) = X (hourly rate)

Nothing in the *Missel* case requires its application to this case because here the earnings for the fixed regular workweek were expressly agreed upon as including overtime and a specific method for calculating the hourly rate from those earnings was also provided. The freedom of contract emphasized by the recent decisions of this Court sanctions agreements by employers and employees upon a weekly "take home" pay, including overtime and subject to reduction by formula to an hourly rate, unless the formula is merely a device to evade the Act.

If the rates derived from the formula are the rates actually paid for non-overtime hours and for overtime hours a premium of at least 50% of the formula rates is paid, then inevitably the purposes of the Act are fulfilled. So, in essence, the question remains: Were the formula rates actually used in determining regular, non-overtime pay to the employees or were they merely a

paper fiction having no demonstrable effect in determining their compensation.

Up to this point, the Circuit Court appears to agree with petitioners (R. p. 84). Its holding that there was an attempt to "circumvent the statute" is plainly based on an erroneous view of the facts, that the formula rates were not actually the rates paid for non-overtime hours. Said the Court: "It does negate the statutory purposes to base employment upon a regular unvarying weekly wage for a workweek in excess of the statutory minimum hours and then merely break that down into so-called regular and overtime hourly rates by means of a formula so the weekly wage actually definitely fixed is seemingly transferred into an hourly wage rate. That amounts but to an illusion of overtime pay after a forty-hour workweek where there can be no increase in pay per workweek because of overtime work unless there is overtime not only in excess of the statutory workweek but also in excess of the agreed workweek" (R. p. 85).

Thus the Circuit Court, while recogni ing that the hourly rates derived from the formula were applied for purposes of overtime beyond the agreed regular workweek of 46 hours (which, incidentally, was the only demonstrable effect of the stated hourly rate in *Walling* v. *Belo*, 316 U. S. 624) totally disregards the fact, as found by the Trial Court, that these rates were actually used in determining compensation for both non-overtime and overtime hours when the employees worked less than the regular workweek. When an employee failed to report for work without excusable cause such as illness, and worked 40 hours or less per week, he was paid only for the hours actually worked on the basis of the formula rate. While there are no instances reflected in the payrolls, if an employee in such a case worked more than 40 hours but less than 46, under the agreement he would have been paid the formula rate for the first 40 hours

worked and time and one-half the formula rate for the hours beyond 40. Where the hourly rate was applied for workweeks of less than 40 hours it cannot be assumed that the rate would have been ignored for workweeks exceeding 40 hours but less than the regular workweek of 46 hours.

These facts, ignored by the Circuit Court, demonstrate positively that the formula rates were the real rates and that the petitioners paid a 50% premium for all hours exceding 40 per week and not merely those exceeding the regular workweek of 46.

If the NWLB Agreement had been merely a continuation of the old weekly arrangement under the preceding Sloan Agreement, as suggested by the Circuit Court, any employee working less than the regular workweek of 46 hours would have been paid a proportionate share of the agreed weekly wage as under the Sloan Agreement. On the contrary, such an employee was paid on the basis of the formula rates.[8] Under the terms of the agreement there is no instance where an employee working less than the regular workweek is paid a proportionate share of the agreed weekly earnings.

---

[8] In *Watkins* v. *Hudson Coal Company*, 151 F. 2d 311, 317 (C. C. A. 3) the method of deducting for all absences on a straight time or proportionate weekly basis, was regarded as significant evidence, among other factors, that the formula had not been used and that the old non-conforming wage arrangements had been continued. "It is obvious that the actual rate used was a straight-time rate and not the formula rate. Employee's wages were figured just as before. There was no application of the regular rate and overtime rate at all. Instead, there was complete reliance upon the fact that a formula had been determined and announced in writing in a wage agreement." Certiorari was denied in this case, U. S. , but no question involving the formula was presented by the petition.

In *Walling* v. *Halliburton Oil Well Cementing Co.*, 152 F. 2d 622, certiorari granted, May 13, 1946, Docket No. 1018, the Administrator's petition for a writ (pp. 5, 11) points also to the method of deducting for absences on a proportionate weekly or monthly basis as positive proof that the stated hourly rate of the employment agreement was fictitious.

4. Final and authoritative review of this case is desirable to avoid protracted and multiple litigation of the same issue in hundreds of similar cases and to settle matters of substantial importance.

The National War Labor Board Agreement which is involved in this case and the Meyer Agreement after which the challenged hourly rate formula was patterned, were in effect in New York City throughout most of the period 1942-1945. Approximately 700 loft buildings and more than 7000 employees in those buildings whose employment was governed by these agreements, are affected by the final outcome of this case.

Already hundreds of actions have been filed by employees in the Federal and State Courts in New York against the employer owners and managing agents to recover additional overtime, liquidated damages and attorneys' fees for the period 1942-1945 covered by these collective agreements. The estimated liability exceeds $10,000,000.

There are definite elements of threatened injustice implicit in this situation which should persuade this Court to exercise its discretionary right of review. The National War Labor Board Agreement with its challenged formula for computing hourly rates, was entered into in good faith by the Union and the employers' association pursuant to the Directive Order of the Board. The agreement, as acknowledged by the Board, was intended to bring the employment relationship into compliance with the Act. No private challenge of its sufficiency under the Act was made until this action was commenced in December 1943 and, then, only on the strength of this Court's decision in *Walling* v. *Helmerich & Payne* (R. 92-93). The Administrator of the Fair Labor Standards Act never challenged the NWLB Agreement during its effective period.

Review by this Court will avoid much needless litigation and will assure the parties involved that the issue has been fully and authoritatively adjudicated.

CONCLUSION

The writ of certiorari should be granted.

Dated: New York, September 12, 1946.

WALTER GORDON MERRITT,
ROBERT R. BRUCE,
Counsel for Petitioner.

JOHN J. BOYLE,
of Counsel.

Appendix A

Hourly Rates of Respondents for Period, April 21, 1942 to December 10, 1943

Plaintiff's Name	Period	Rates Hourly
Del Rio	4/21/42— 8/ 8/42	.544
	8/10/42— 4/20/43	.561
	4/21/43—12/10/43	.589
Manne	4/21/42— 8/ 8/42	.544
	8/10/42— 4/20/43	.561
	4/21/43—12/10/43	.589
McCole	4/21/42— 6/13/42	.392
	6/15/42— 8/8/42	.401
	8/10/42—4/20/43	.45
	4/21/43—12/10/43	.473
Peterson	4/21/42— 8/ 8/42	.544
	8/10/42— 4/20/43	.561
	4/21/43— 8/ 7/43	.589
Torra	4/21/42— 8/ 8/42	.604
	8/10/42— 4/20/43	.622
	4/21/43—12/10/43	.651
J. H. Berger	4/21/42— 9/12/42	.769
	9/14/42— 3/20/43	.865
	3/21/43—12/10/43	.962
Rodriguez (Sanchez)	4/21/42— 8/8/42	.577
	8/10/42— 1/25/43	.612

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 497

149 MADISON AVENUE CORP. and WILLIAMS & CO., INC.,
Petitioners,

against

FRANK ASSELTA, CAMILO DEL RIO, JOSEPH McARDLE, SAMUEL MANNE, CORNELIUS McCOLE, BURTON PETERSON, FRANK RODRIGUEZ, JAMES TORRA, JOHN H. BERGER and GEORGE BERGER,
Respondents.

BRIEF FOR PETITIONERS

WALTER GORDON MERRITT,
ROBERT R. BRUCE,
Counsel for Petitioners.

JOHN J. BOYLE,
of Counsel.

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Opinions Below

The opinion of the District Court (R. 184-203) is reported at 65 F. Supp. 385. The opinion of the Circuit Court of Appeals (R. pp. 81-85) is reported in 156 F. 2d 139.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on June 17, 1946 (R. p. 84). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925. The petition for a writ of certiorari was filed on September 13, 1946 and originally denied on October 28, 1946. Pe-

tition for rehearing was filed on November 22, 1946 and granted on December 9, 1946. The order denying certiorari was vacated and the writ granted on December 9, 1946.

Question Presented

Pursuant to a Directive Order of the National War Labor Board made on July 29, 1942, an employers' association of which petitioners are members and a labor union of which all respondents except two are members,[1] entered into a collective bargaining agreement (known as the National War Labor Board Agreement) fixing terms and conditions of employment for thousands of building service employees in a large number of loft, office and apartment buildings in New York City, for the period April 21, 1942 to April 20, 1945. The Directive Order of the Board and the resultant master agreement were made subsequent to the decision of this Court in *Kirschbaum* v. *Walling*, 316 U. S. 517, holding the Fair Labor Standards Act applicable to loft buildings tenanted by manufacturers producing goods for interstate commerce. The employers and the union intended, as the War Labor Board recognized, to bring the wage and hour provisions of their agreement applicable to loft and office building employees into compliance with that Act.

For a regular workweek of 46 hours the agreement provided weekly earnings or "take home" pay which included overtime pay for the regular workweek at time and one-half the contract hourly rates computed on the basis of the following formula, which is nothing more than a restatement of the Act's overtime requirements:

---

[1] Respondents, John H. Berger and Frank Rodriguez, sometimes identified on the payrolls as Sanchez, were members of another union and were not subject to the NWLB Agreement as such. However, they agreed that their hourly rates would be calculated as provided in that Agreement (R. 153-155).

> "The hourly rates for those regularly employed more than forty (40) hours per week shall be determined by dividing their weekly earnings by the number of hours employed plus one-half of the number of hours actually employed in excess of forty (40) hours."

The hourly rates so computed were set forth on the payrolls and acknowledged weekly by the employees and were actually applied at all times whether they worked fewer hours or more hours than the scheduled workweek of 46 hours. The agreement provided that it should not be construed to lower the hourly rate presently received by any employee.[2]

The question presented is whether the hourly rates computed by the terms of the master agreement and set forth on the payrolls are the "regular rates" for purposes of overtime under Section 7 (a) of the Fair Labor Standards Act of 1938 or whether the *Missel* formula (wage divided by hours equals regular rate, 316 U. S. 572, 580) applies despite the contrary agreement and practice of the parties.

---

[2] The NWLB Agreement was signed on September 1, 1942. For the period after September 1, the hourly rate fixed thereby for all respondents except Berger and Rodriguez, who were not members of Local 32-B and not subject to this provision, are higher than their hourly rates under the preceding Sloan Agreement which expired on April 20, 1942 computed on the basis of the *Missel* formula. Wages and hourly rates under the NWLB Agreement were made retroactive to April 21, 1942 by agreement between the union and the employers as suggested by the War Labor Board. Even during this retroactive period the hourly rates fixed by the master agreement are higher than those effective at the expiration of the Sloan Agreement, except for McCole, the watchman. See Appendix A.

Statute Involved

The pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C., Secs. 201, *et seq.*) are as follows:

> Sec. 7 (a). No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—
>
> * * * * * *
>
> (3) For a workweek longer than forty hours * * * unless such employee receives compensation for his employment in excess of the hours above specified at a rate of not less than one and one-half times the regular rate at which he is employed.

Statement

(a) *Preliminary*

Petitioners, owner and managing agent, employed respondents in a loft building in New York City. It is conceded that the work performed by respondents is covered by the Act (R. 220). While the original complaint covered the period October 24, 1928 to April 20, 1942, by amendment at the trial, the period was extended to December 10, 1943, being the date the action was commenced. The period which is now involved is April 21, 1942 to December 10, 1943, since all issues prior thereto have been settled (R. 214-225).

There was no oral testimony with respect to the phase of the case now involved. The facts with respect to the issues are found in two stipulations (R. 119-135, 139-159) and five exhibits which are bound separately and handed up to this Court pursuant to agreement between the attorneys (R. 115-117).

It is stipulated that for the period, April 21, 1942 to December 10, 1943, respondents "were employed and paid in accordance with the terms and conditions of employment provided in a collective bargaining agreement known as the National War Labor Board Agreement" between Realty Advisory Board on Labor Relations, Inc., on behalf of the various signatory employers, and Local 32B, Building Service Employees International Union, A. F. of L., on behalf of the employees (Pl. Ex. 2, R. 120-122). That agreement fixed a regular workweek for employees, other than watchmen, of 46 hours; for watchmen, of 54 hours. It also provided for weekly earnings for all workmen employed thereunder for the stipulated regular workweek, and stated that "it is the intention of the parties that the wages paid, as provided for in this agreement, * * * shall constitute full payment for services rendered under this agreement * * *" (Pl. Ex. 1, Article III, par. 6, p. 7).

In addition to providing for earnings for the regular workweek, the NWLB Agreement providing a formula for determining hourly rates which governed the payment of non-overtime and overtime where the hours worked were less than or more than the agreed regular workweek. Express hourly rates were also fixed for those employees having no regular workweek. The agreement provided that it should not be construed to lower the hourly rate presently received by any employee (Pl. Ex. 1, Art. III, par. 12, p. 6). It expressly provided an overtime rate of "at least time and one-half" for all hours worked in excess of 40 hours per week. Employees, other than watchmen, working more than 46 hours per week or more than 9½ hours per day, are paid "an overtime rate of time and three-quarters" for such overtime. Watchmen working more than 54 hours per week or more than 11½ hours per day, are paid double time (Pl. Ex. 1, "Hours And Hourly Rates", pp. 27 to 30).

It is clear, therefore, that the regular weekly earnings or wages directed by the War Labor Board and incorporated by the parties in their agreement included full payment for all overtime embraced within the regular workweek of 46 or 54 hours, as the case might be, and not merely payment for non-overtime hours. Failure to grasp this fact was the source of the basic legal error in the District Court's decision. The Court in assuming (R. 198-199) that plaintiffs were employed for a fixed workweek at a fixed weekly wage, ignored the fact that the so-called fixed wage included overtime and was intended to be full compensation for such a workweek.

(b) *Background of Agreement*

Since 1934, a substantial number of owners of loft, office and apartment buildings, in the Borough of Manhattan have bargained collectively with Local 32B regarding the terms and conditions of employment of their building service employees. A brief history of this relationship and a description of the resulting agreements is set forth in the Report and Recommendations of the Mediation Panel of the National War Labor Board (Pl. Ex. 4, pp. 4 to 17 inclusive). More than 2,200 separate buildings, including approximately 700 loft buildings, have been involved. In these negotiations, there have been two distinct sets of agreements; one set (McGrady Agreement, February 4, 1939 to February 3, 1942; Meyer Agreement, February 4, 1942 to February 3, 1945) known as the Garment Center Agreements, between Local 32B and the Midtown Realty Owners' Association, Inc. and the Penn Zone Association, Inc., covering loft and office buildings in the Garment Area; the other (Sloan Agreement, April 24, 1939 to April 20, 1942; National War Labor Board Agreement, April 21, 1942 to April 20, 1945) between Local 32B and the Realty Advisory Board on Labor Relations, Inc., covering loft, office and apartment build-

ings elsewhere in Manhattan. The pattern of the two sets of agreements was naturally similar.

During the period April 24, 1939 to April 20, 1942, the respondents were employed pursuant to the Sloan Agreement (Pl. Ex. 2, R. 126; Pl. Ex. 3). Weekly wages of $24 for a 47-hour week (watchmen, 59 hours) were established for Class "C" loft buildings, that being the classification of the building in controversy (R. 121). The Sloan Award, following an interim arbitration of wages and hours called for by the basic agreement, resulted in the raising of the weekly wage for Class "C" lofts to $25 per week, effective October 20, 1940 (Pl. Ex. 4, pp. 12-13).

The Sloan Agreement contained no provision, express or implied, that the regular weekly wage included overtime and there was no provision for determining hourly rates. The only rates mentioned were weekly rates for various jobs and for classes of buildings. There was no provision for overtime between 40 hours per week and the regular workweek of 47 hours. The Sloan Agreement as well as the McGrady Agreement in the Garment Center were negotiated in 1939, at a time when both laymen and lawyers, entertained no serious thought that building service employees of independent landlords were "engaged in commerce or in the production of goods for commerce" within the meaning of the Fair Labor Standards Act. See, *Fleming* v. *Arsenal Building Corporation,* 38 F. Supp. 207, Woolsey, J. (S. D. N. Y., April 11, 1941); *Killingbeck* v. *Garment Center Capitol, Inc.,* 259 App. Div. 691 (1st Dept. June 7, 1940), leave to appeal denied, 259 App. Div. 1076, 284 N. Y. 818.

The story of the tidal wave of retroactive liabilities which engulfed loft building owners and managing agents in New York City and throughout the nation after this

Court decided *Kirschbaum* v. *Walling*, 316 U. S. 517, is well known.[3]

The Sloan Agreement provided (Pl. Ex. 3, p. 21) that by February 1, 1942 the parties would enter into negotiations for a new agreement. Meanwhile the decision of the Circuit Court of Appeals for the Second Circuit in *Fleming* v. *Arsenal Building Corporation*, 125 F. 2d 278, entered the picture on December 30, 1941. This involved a building in the Garment Center under the Meyer Agreement which was due to expire on February 3, 1942. As a result the Union and the two Associations, in the Garment Area, after an arbitration before Mr. Arthur S. Meyer, Chairman of the New York State Mediation Board, entered into the Meyer Agreement, covering the period February 4, 1942 to February 3, 1945, which for the first time in the bargaining between Local 32B and the owners, fixed hourly rates governing the employment of all classifications of employees (Pl. Ex. 4, pp. 16-17; 33-34; 70-72).

Local 32B and the Realty Board commenced negotiation in March, 1942 for a new agreement to succeed the Sloan Agreement and the matter ultimately went before the National War Labor Board in Washington, D. C. (Pl. Ex. 4, pp. 6, *et seq.*). The Panel's Report which the Board adopted, states at pages 33 to 34:

> "It was understood at the hearing that if the Board set hours for office and lofts above the 40-hour

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[3] *Adams* v. *Union Dime Savings Bank*, 53 F. Supp. 782, aff'd 144 F. 2d 290 (C. C. A. 2, 1944), certiorari denied 323 U. S. 751, October 16, 1944; *O'Neil* v. *Brooklyn Savings Bank*, 267 App. Div. 317 (1st Dept., 1943), aff'd 293 N. Y. 666, aff'd 324 U. S. 697; *Gangi* v. *D. A. Schulte, Inc.*, 53 F. Supp. 844, reversed 150 F. 2d 694, aff'd U. S. , 90 Law ed. (Adv. op.) 873; *Borden Co.* v. *Borella*, 325 U. S. 679.

The estimated liability of building owners in New York City if the decision in the present case stands, exceeds $10,000,000, New York Sun, January 10, 1946, p. 12.

maximum demanded by the Union, the parties would adopt the formulae of the Meyer Agreement for the calculation of hourly rates, and the fixing of overtime. These formulae were introduced because of the prospective application to loft buildings of the Fair Labor Standards Act. We quote and explain them in Appendix B. As they have been accepted in principle by the parties, we believe they should be incorporated into the present contract."

At the hearing before the Board it was understood and agreed that the new wages and hourly rates agreed upon by the parties or ordered by the Board, would be retroactive to April 21, 1942, when the Sloan Agreement expired (Pl. Ex. 4, p. 49; Pl. Ex. 2; R. 133).

(c) *Application of Hourly Rates under the Agreement*

Pursuant to the Directive Order (Pl. Ex. 4), the Union and the Realty Advisory Board on Labor Relations, Inc., on September 1, 1942, signed the NWLB Agreement. This agreement (Pl. Ex. 1, Article VIII, p. 12), provides that the agreement is to take effect September 1, 1942, except that the wages, hourly rate formulae and the hourly wage rates, provided for in the agreement, shall be effective retroactively to April 21, 1942, and that the formulae and the hourly rates for the period, April 21 to September 1, 1942, shall be computed on the basis of the hours provided in the Sloan Agreement (which, of course, had already been worked). This merely carried out the previous agreement of the parties and the suggestion of the Board in line with normal and sound practice in such matters.

Pursuant to the retroactive clause in the agreement, the respondents who were members of the Union were paid the retroactive increase (Pl. Ex. 6—retroactive payroll for period, April 21, 1942 to September 5, 1942, p. 35

of Exhibit Volume). All work performed from April 21, 1942 to September 5, 1942 was performed in anticipation of and subject to the new wages of which the hourly rates were an integral part. Obviously, the new hourly rates for this period could not be reflected on the current payrolls and it was not practicable to recompute the payrolls and make adjustments at the new rates reflecting absences, both excusable and inexcusable. Instead a flat amount was paid as though each employee had worked regularly during the period. On this basis more was paid the employees than required by the agreement.

The Circuit Court's comment (R. p. 85) on this retroactive arrangement was unwarranted in fact or in law. Said the Court: "The attempt to make the contract consummated in September retroactive to April 20 but highlights the illusion that the new contract was more than a continuation of the old wage arrangement which did not comply with the statute. The right to overtime pay which had already accrued to these appellees could not thus be waived." Since overtime was worked during this period, respondents were entitled to payment therefor in accordance with the Act. But the liability had not yet accrued since the wage rates governing employment for this period were still in negotiation and overtime could not possibly have been computed. "But Section 7 (a) does not require the impossible. If the correct compensation cannot be determined until some time after the regular pay period, the employer is not thereby excused from making the proper computation and payment. Section 7 (a) requires only that the employees receive a 50% premium as soon as convenient or practicable under the circumstances." *Walling* v. *Harnischfeger Corp.*, 325 U. S. 427, 432.

Nor does the retroactive application of the new agreement to cover the negotiating period show a continuation of the old arrangement. Such a conclusion ignores the

fundamental transition from the Sloan Agreement which merely fixed non-overtime wages for a fixed workweek of 47 hours without any provision for overtime within the 47 hour workweek (excepting daily overtime which was paid after 9½ hours per day) and the NWLB Agreement which provided for total earnings inclusive of overtime for the regular workweek in excess of the weekly wage under the Sloan Agreement, and expressly required overtime after 40 hours per week and 9½ hours per day on the basis of the hourly rate derived from an express formula.

The formula of the NWLB Agreement (following that of the Meyer Agreement) for determining the hourly rates of the respondents and the provisions for payment of wages, whether overtime or non-overtime, on the basis of these rates, is set forth in detail at pages 27 to 30 of the Agreement (Pl. Ex. 1). The essence of the formula fixing the rates is as follows:

> "The hourly rates for those regularly employed more than forty (40) hours per week shall be determined by dividing their weekly earnings by the number of hours employed plus one-half of the number of hours actually employed in excess of forty (40) hours."

At the moment the agreement became effective, there was immediately fixed for each respondent a definite hourly rate: the quotient of the employee's prospective earnings for his regular workweek divided by 50.5 (hours regularly employed, or 47, plus one-half the number of hours regularly employed in excess of 40 hours, or 3.5, equals 50.5).[4] Thus the hourly rate of the respondent

[4] The divisor for watchmen, such as respondent McCole, whose regular workweek under the agreement was 54 hours, was 61 (54 plus one-half the hours in excess of 40, or 7, equals 61).

Peterson at the effective date of the agreement was $.544, being the quotient of $27.50, his prospective earnings for a regular workweek under the NWLB Agreement and 50.5. As demonstrated in detail later, this hourly rate was constant and determined his wages in all given situations, whether he worked less hours or more hours than his regular workweek. Peterson's hourly rate, as well as those of the other employees, thus fixed at the effective date of the agreement, changed only when his regular workweek was shortened or when his prospective earnings for his regular workweek were increased pursuant to the agreement. Such a change of rate occurred when Peterson's regular workweek changed from 47 hours per week to 46 hours per week beginning August 10, 1942, in anticipation of the signing of the NWLB Agreement. His rate then became $.561 per hour ($27.50, prospective earnings, divided by 49). His rate changed again as of April 21, 1943 when, pursuant to an interim arbitration award under Article III, par. 3, page 6 of the agreement, his earnings for a regular workweek were increased to $28.90. His rate then became $.589 ($28.90 divided by 49).

The individual hourly rates resulting from the NWLB Agreement were incorporated into the payrolls which the respondents signed each week. The payrolls show that these rates were actually applied in determining respondents' pay whether their hours exceeded or were less than the regular workweek. The Trial Court so found (R. 200-201).

Respondent members of the Union were paid retroactively pursuant to Article VIII (Pl. Ex. 1, p. 12) of the agreement. Each received an increase of $2.50 over his weekly pay under the Sloan Agreement but on the understanding that the newly agreed weekly earnings included overtime inherent in the regular workweek. The

formula was then applied on the basis of the hours under the Sloan Agreement (47 hours) and the prospective earnings of $27.50 ($25 plus $2.50 increase). To illustrate, respondent Peterson, under the Sloan Agreement, worked 47 hours for a weekly wage of $25. Under the retroactive clause of the NWLB Agreement, Peterson received a $2.50 increase, bringing his earnings to $27.50—$27.50 divided by 50.5 (47 plus 3.5 hours) pursuant to the formula, equals $.544. 40 times .544 = $21.78 plus 7 times .816 (time and one-half) = $5.72, or $27.50. Respondents therefore were entitled to a retroactive payment of $2.50 for each of the regular workweeks actually worked during the period, April 21, 1942 to September 5, 1942 which they received (Pl. Ex. 6—retroactive payroll for period, April 21, 1942 to September 5, 1942, page 35 of Exhibit Volume).

For the period, September 20, 1942, to December 10, 1943, each respondent was paid on the basis of the hourly rate appearing on the payroll records (rates for period April 21, 1943 to October 29, 1943 were later subject to a retroactive adjustment). Each weekly payroll shows the number of hours worked each day, the number of non-overtime hours (40 or less), the hourly rate, wages paid for non-overtime hours, the number of overtime hours, the basis upon which the overtime hours were compensated for, *i. e.*, 150% of the hourly rate for hours between 40 and 46 and 175% of the hourly rate for hours in excess of 46, or in excess of 9½ per day, the total number of hours worked each week and the total pay (Pl. Ex. 6, pp. 36-103 of Exhibit Volume).

A schedule is annexed to this petition as "Appendix A", showing the hourly rate (adjusted, of course, to show the two retroactive increases) for each respondent for the period April 21, 1942 to December 10, 1943. These rates are shown in relation to respondents' hourly rates

effective at the expiration of the prior Sloan Agreement on April 20, 1942 as computed on the *Missel* formula. For the period, April 21, 1942 to September 5, 1942, the hourly rates were determined by the formula, using the wage increase under the NWLB Agreement plus the wages under the Sloan Agreement and the hours under the Sloan Agreement. For the period, September 20, 1942 to April 20, 1943, the hourly rates are those shown on the payroll records. For the period, April 21, 1943 to October 29, 1943, the hourly rates are those shown on the payrolls plus the increase given in October, 1943, retroactive to April 21, 1943 (Pl. Ex. 6, p. 97 of Exhibit Volume). For the period, October 30, 1943 to December 10, 1943, the hourly rates are those shown on the payroll records.

Respondents were compensated on the basis of these hourly rates for all time worked by them, whether the hours exceeded or were less than 40 hours per week.

For example, respondent Peterson was absent for inexcusable cause for three days or 23 hours during the week February 28, 1943 to March 6, 1943 (Defs. Ex. B, par. 2(b) and (c), R. 143-145). He therefore worked 23 hours and was paid $12.90 (23 hours x .561, hourly rate; see Pl. Ex. 6, p. 60 of Exhibit Volume).

It does not appear that Peterson or any other respondent was ever absent inexcusably for only part of a day during any workweek. Assuming, however, for the period August 10, 1942 to April 20, 1943 when Peterson's hourly rate was .561, that he worked only 42 hours in a given week and was inexcusably absent for 4 hours, his pay would have been computed as follows: 40 hours (regular time) x .561 (regular hourly rate) or $22.44 plus 2 hours (overtime) x .843 (overtime rate) or $1.68, making a total of $24.12 (Defs. Ex. B, R. 143).

The method of treating excusable absences is set forth in Defendants' Exhibit B, par. 2(a) (R. 141-142). During the week of December 13 to 19, 1942, Peterson worked 30 hours, being absent for excusable cause two days or 16 hours. He was paid $13.44 (24 hours x .561) plus $5.06 (6 hours x .843) or a total of $18.50 (see Pl. Ex. 6, p. 48 of Exhibit Volume). Pursuant to the Agreement, Section III, par. 5 (i), p. 29, there was deducted from Peterson's earnings, $9.00 (16 hours x .561) for these excusable absences.

Pursuant to the agreement, employees, other than watchmen, working more than 46 hours per week were paid an overtime rate of time and three-quarters. During the week of January 24, 1943 to January 30, 1943, Peterson worked six days for a total of 52 hours. For that week he received $22.44 (40 hours x .561) plus $5.06 (6 hours x .843) plus $5.88 (6 hours over 46 hours x .98, time and three-quarters) or a total of $33.38 (See Pl. Ex. 6, p. 55 of Exhibit Volume).

(d) *Analysis of Opinions Below*

While the District Court found as a fact that petitioners "here actually applied in all situations the hourly rates so derived" (*i. e.*, from the formula), he ruled that: "The manner in which the hourly rate is determined and not the application of an hourly rate is the test" (R. 200-201). The formula was held ineffective under Section 7(a) because: "The hourly rates derived by the use of the formula bore no relation to the regular rate of the workweek as defined in *Overnight Motor Co.* v. *Missel*" (R. 198).[5]

[5] While the District Judge apparently read the formula as calling for a variable weekly rate thus explaining his comment that: "In practice the formula was not strictly followed" (R. 197), he nevertheless found that the rates "did not so vary but remained the same

(*Continued on following page*)

In response to petitioners' attack on the Trial Court's ruling and their argument that the *Missel* formula has no application where the parties have agreed upon weekly earnings, inclusive of overtime, for a fixed regular workweek, and have also agreed upon a formula for allocating those earnings to non-overtime and overtime which is no more than a restatement of the Act's requirements, the Circuit Court said: "In the absence of any attempt to circumvent the statute we might agree" (R. p. 84). But the Circuit Court's holding of circumvention is based on nothing more than the District Court's findings (No. 18 and No. 19, R. 171-172) as to the purpose of the formula which are a repetition of the War Labor Board's description of how the formula operates and a patently unsound legal test that compliance with the Act requires payment of more than the agreed weekly wage for a workweek exceeding 40 hours; or to put it another way, there can never be an effective agreement upon weekly wages inclusive of overtime.

It begs the question to say that the formula is bad because it reduces the hourly rate below what it would be if computed in the ordinary way (*i. e.*, the *Missel* formula that hourly rate equals weekly wages divided by weekly hours) "so the payment of time and a half for overtime would not bring the total weekly earnings substantially above the weekly rates set by the agreement." The question is whether anything in the Act makes the ordinary way of computation mandatory where the parties have made the type of agreement here involved.

The Circuit Court's holding that the NWLB Agreement "does negate the statutory purposes" is also based upon

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from week to week as if the plaintiff actually worked only the regular workweek" (R. 73). Between April 20, 1942 and December 10, 1943, the hourly rates remained fixed except when the agreed weekly earnings or agreed regular workweek were changed pursuant to the agreement. This reflected the understanding of the parties and the War Labor Board (Appendix B, Pl. Ex. 1, pp. 70-71).

total disregard of the fact, as found by the District Court, that the formula rates were "actually applied in all situations." This is manifest from the Court's reference to a fixed weekly wage "seemingly transferred into an hourly rate" and to "an illusion of overtime pay after a forty hour workweek where there can be no increase in pay per workweek because of overtime unless there is overtime not only in excess of the statutory workweek but also in excess of the agreed workweek."[6] There is nothing "seeming" or "illusionary" about hourly rates that are actually applied.

The District Court misapprehended the true bearing of the more recent decisions of this Court dealing with Section 7(a) of the Act. The Circuit Court adopted an untenable legal test of validity under Section 7(a) and ignored the plain facts of the case as well.

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[6] The Circuit Court attempts to bolster its argument that the regular rate was a fixed weekly wage by reference to certain alleged payroll discrepancies not mentioned by the District Court. "The slight discrepancies were then simply ignored and the agreed weekly rate was always paid instead of what would be due under the formula" (R. p. 84). Obviously where an employee worked his regular workweek, the amount due under the formula was necessarily the agreed weekly earnings, which included overtime. The Circuit Court apparently refers to the fact that hourly rates and overtime rates derived from the formula were only carried to three decimals and therefore the extensions of these rates were not accurate to the exact cent. However, the existing decisions confirm petitioners' practice of carrying the hourly and overtime rates to the nearest tenth of a cent per hour. *Snyder* v. *Wessner*, 55 F. Supp. 971, 976; *Anderson* v. *Federal Cartridge Corp.*, 62 F. Supp. 775, 785.

There are also some errors in the payrolls. But occasional errors cannot obscure the fact that in general the contract rates were correctly computed, set forth and applied on the payrolls. A gross miscarriage of justice would result if occasional errors by a payroll clerk were used to invalidate a collective bargaining agreement affecting hundreds of employers.

Specification of Errors

The Circuit Court erred:

1. In holding that the contract hourly rates fixed by the NWLB Agreement were not the regular hourly rates for purposes of overtime under Section 7(a) of the Act.

2. In holding that the respondents were entitled to overtime, liquidated damages of equal amount, attorneys' fees and costs under Section 16(b) of the Act.

Summary of Argument

Under the Act employers and employees may establish the regular rate contractually at any point at or above the minimum provided in Section 6 and the contract rate will be adjudged the regular rate in determining compliance with Section 7 if it is the rate "actually paid for the normal, non-overtime workweek".

Here the employer and employees, pursuant to a master collective bargaining contract covering hundreds of employers and thousands of employees, agreed upon a fixed regular workweek and fixed wages for that workweek inclusive of overtime ($27.50 per week for 46 hours for a majority of respondents during most of the period involved). The master agreement provided an express formula for calculating regular hourly rates which was simply an algebraic restatement of the requirements of Section 7. (Agreed weekly wages divided by the hours of the regular workweek plus half the hours by which the regular workweek exceeded 40; or, in the above example, $27.50 divided by 49 = $.561 per hour.) The master agreement required payment for overtime after 40 hours per week at 150% of the contract hourly rate and after 46 hours per week at 175% of the contract hourly rate. The hourly rates thus fixed were "actually applied

in all situations", as the District Court found, whether the respondent employees worked more hours or less hours than the regular workweek or the statutory workweek.

The District Court erred in ruling that the *Missel* formula (wages divided by hours equals regular rate) applies where the parties have agreed that the stipulated wage for a regular workweek exceeding 40 hours includes overtime and have adopted an express formula for calculating the hourly rate. The Circuit Court's conclusion that the statutory purposes are negated because there is only "an illusion of overtime pay after a forty hour workweek where there can be no increase in pay per workweek because of overtime work unless there is overtime not only in excess of the statutory workweek but also in excess of the agreed workweek", conflicts with *Walling v. Belo,* 316 U. S. 624 and with the decisions of several circuit courts. This test unreasonably limits the scope of collective bargaining in that it precludes any agreement between employer and employee upon "take home" pay for a workweek exceeding 40 hours per week. Its unsoundness is demonstrated by the fact that it would invalidate other types of agreements involving regular employment for hours exceeding the statutory workweek, particularly those current during the war emergency and not heretofore regarded as offending the Act.

Moreover, the Circuit Court plainly disregarded the facts since the hourly rate was actually applied in this case and was in no sense fictional. The contract hourly rate was paid for hours worked of 40 or less per week; 150% of that rate was paid for hours between 40 and 46 per week and 175% for hours exceeding 46. The contractual provision whereby employees did not lose the benefit of their normal overtime pay because of excusable absences for illness or because of recognized holidays show no evasive departure from the contract rate in the "normal, non-overtime workweek". Workweeks where more than the contract rate was paid for these reasons

are not "normal". To treat them as such for the purpose of impeaching the genuineness of the contract rate penalizes the employer for following established and liberal practices, circumscribes the power to deal with abnormal situations in collective bargaining where the employee loses work time without fault and in the end injures the employees whose interests the Act sought to benefit.

The contract hourly rates were applied in all normal situations and should therefore be adjudged the real or "regular" rate for purposes of Section 7 (a) of the Act.

ARGUMENT

I

The hourly rates fixed by the terms of the National War Labor Board Agreement, set forth on the payrolls and acknowledged weekly by the employees in this case were the rates paid for "normal, non-overtime" hours and the basis of all overtime pay and were, therefore, the "regular rates" under Section 7 (a) of the Act.

(a) Reality of contract rate is this Court's test under Section 7 (a).

The cases in this Court dealing with Section 7 (a) of the Act reflect a common principle. The "regular rate" under Section 7 (a) must be a real rate, not a fictitious one. Employers and employees are free by collective bargaining to establish the "regular rate" at any point at or above the minimum prescribed by Section 6 subject to one condition:—

> "The regular rate by its very nature must reflect all payments which the parties have agreed shall be received regularly during the workweek, exclusive of overtime payments."
>
> *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, at page 424.

"* * * we look not to contract nomenclature but to the actual payments, exclusive of those paid for overtime, which the parties have agreed shall be paid during each workweek."

Walling v. *Harnischfeger Corp.*, 325 U. S. 427, at page 430.

"While the words 'regular rate' are not defined in the Act, they obviously mean the hourly rate actually paid for the normal, non-overtime workweek."

Walling v. *Helmerich & Payne*, 323 U. S. 37, at page 40.

If the regular rate were not computed so as to reflect all payments regularly made for non-overtime work, the statutory purposes would obviously be frustrated as pointed out by Mr. Justice Murphy in *Walling* v. *Harnischfeger Corp.*, at page 430:

"To compute overtime compensation from the lower and unreceived rate is not only unrealistic but is destructive of the legislative intent. A fully 50% increase in labor costs and a full 50% wage premium, which were meant to flow from the operation of Section 7 (a), are impossible of achievement under such a computation."

In *Walling* v. *Belo Corp.*, 316 U. S. 624, the majority opinion and the dissenting opinion do not disagree upon the basic principle. The opinion for the Court says (p. 631):

"In its initial stage the question to which this dispute gives rise is a question of law, a question of interpretation of the statutory term 'regular rate' But it is agreed that as a matter of law employer and employee may establish the 'regular rate' by contract."

And the dissenting opinion states (p. 636):

"The Court's interpretation that, in the absence of bad faith, any form of contract which assures

the payment of the minimum wage and the required overtime complies with the Act may be assumed to be correct."

The sharp disagreement between the opinions lay in the dissenting view (p. 638) "that the guaranty was the heart of the arrangement" and that "until these hours are exceeded (54½ per week), the stipulated wage per hour has no demonstrable effect" (p. 637).

Close reading of the opinions of both courts below discloses that the District Court and the Circuit Court do not agree as to their reasons for condemning the NWLB Agreement. The District Court (R. 198-200) arbitrarily treated the weekly earnings for the regular workweek as a regular weekly wage for non-overtime hours and applied the formula of the *Missel* case, 316 U. S. 572 as the only lawful method of computing the hourly rate. That treatment was clearly erroneous because it disregarded the agreement between the parties that the weekly earnings included all overtime inherent in the regular workweek and that a formula other than the *Missel* formula should be used to calculate the hourly rate. It also disregarded the legal bearing of the finding that the hourly rates derived from the formula were the rates actually paid for hours less than or more than the regular workweek.

Under the decisions of this Court referred to above, the regular rate is computed from the regular weekly payments, "exclusive of overtime." Allocation of non-overtime earnings and overtime is precisely the function of the formula. In the formula the hourly rate necessarily reflects all non-overtime payments for the regular workweek.

The *Missel* formula was intended to apply only as a means of reducing weekly straight time, or non-overtime wages to an hourly rate. The presence of overtime in the agreed weekly wages or earnings destroys its ap-

plicability. The *Missel* formula has never been regarded by this Court, by the Circuit Courts or by commentators on this Court's decisions under the Act as absolute in the face of contrary agreement by employer and employees.[7]

(b) Second Circuit Court's test conflicts with this Court and other Circuits and produces unreasonable results.

The Circuit Court below apparently disagrees with the District Court that the *Missel* formula is mandatory and that the formula used in this case and in the *Bergschneider* and *Shepler* cases is *per se* invalid (R. p. 83). However, as the formula was used here, the Circuit Court thought the statute had been circumvented. Said the Court (R. pp. 83-84):

> "The result was employment at whatever regular workweek and at whatever regular weekly wage the parties saw fit to agree upon which remained constant regardless of work in excess of forty hours per week which was not in excess of the number of hours in the agreed workweek (this statement is plainly at odds with the facts; indeed, with an express stipulation on the point (R. 143) * * * It does negate the statutory purposes to base employment upon a regular unvarying weekly wage for a workweek in excess of the statutory minimum hours and then merely break that down into so-called regular

[7] "We, of course, express no opinion as to the proper computation of the regular rate under other circumstances. Nor do we intend to indicate that the formula we have used as satisfying the statutory requirements (i.e., the *Missel* formula) is the only one which respondent could adopt as complying with them." *Walling* v. *Helmerich & Payne*, footnote, p. 41.

"There was no agreement providing for an hourly rate of pay or that the weekly salary included additional compensation for overtime hours" *Warren-Bradshaw Co.* v. *Hall*, 317 U. S. 88, 93. While the *Missel* formula was there held to govern the determination of

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and overtime hourly rates by means of a formula so the weekly wage actually definitely fixed is seemingly transferred into an hourly wage rate. That amounts but to an illusion of overtime pay after a forty hour workweek where there can be no increase in pay per workweek because of overtime work unless there is overtime not only in excess of the statutory workweek but also in excess of the agreed workweek."

No subtle analysis is required to demonstrate that the test by which the Second Circuit Court of Appeals condemned the NWLB Agreement invalidates any wage plan fixing or guaranteeing compensation on a weekly or monthly basis for a regularly scheduled workweek exceeding forty hours or an irregular workweek habitually exceeding forty hours per week. Thus the critical test applied by the Court below is in conflict with the decision of this Court in *Walling* v. *Belo*, 316 U. S. 624, with the Fifth Circuit Court which initially sustained the *Belo* type of contract, the Ninth Circuit Court of Appeals as illustrated by its decision in *Walling* v. *Halliburton Oil Well Cementing Co.*, 152 F. 2d 622, now scheduled

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the hourly rate, the quoted language certainly suggests that it would have no application to the type of agreement here involved.

In *Bergschneider* v. *Peabody Coal Co.*, 142 F. 2d 784 (C. C. A. 7) and *Shepler* v. *Crucible Fuel Co.*, 140 F. 2d. 371 (C. C. A. 3) the stated hourly rates were computed as the quotient of agreed weekly earnings inclusive of overtime and the sum of the agreed weekly hours plus one-half the hours in excess of the statutory workweek. Certainly no sound distinction rests in the fact that there the hourly rate was expressly stated and here it had to be computed, where the computing formula is identical.

"The result (referring to *Walling* v. *Harnischfeger Corp.*) is consistent with the *Missel* case, which may be regarded as holding that, *at least in the absence of some clear provision to the contrary in the contract*, the regular rate should be ascertained by dividing total weekly earnings by hours worked." Dodd, "The Supreme Court and Fair Labor Standards, 1941-1945", 59 Harvard L. Rev. 321, 363 (Italics ours.)

It would be difficult to draft a clearer "provision to the contrary" than the formula of the NWLB Agreement.

for argument with the present case as Docket No. 74 and the Sixth Circuit Court in *Walling* v. *General Industries Co.*, 155 F. 2d 711, also scheduled concurrently for argument as Docket No. 564.

Recognition of the social and economic desirability of encouraging stabilized earnings in types of business and industry where hours are necessarily irregular is, of course, the articulate premise of the *Belo* decision.[8] Where hours of employment are more or less regular, as in the operation of commercial real estate, security is valued no less by employees. Moreover, certainty of cost for normal operations is a great advantage if not an indispensable requisite to the employer who must fix the price for his goods or services far in advance of performance. Here the employee thinks more naturally in terms of "take home" pay rather than of hourly rates just as the employer thinks of ultimate labor cost. Here both are more predictable because of the normal regularity of employment. But, paradoxically, where both employer and employee have counted heavily on predictability of the final result in dollars and cents of take-home pay and labor cost, the Court below by its legal test outlaws any form of agreement which reduces normal predictability to certainty.

Under the decision of the Second Circuit Court there is no longer any freedom of contract fixing total take-home pay for a regular workweek exceeding 40 hours or on any workweek in excess of 40 hours. To illustrate:

(a) The parties agree upon a regular workweek of 46 hours and a regular weekly wage of $49.00 inclusive of overtime at 150% of the regular rate for all hours ex-

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[8] "Many such employees value the security of a regular weekly income. They want to operate on a family budget, to make commitments for payments on homes and automobiles and insurance. Congress has said nothing to prevent this desirable objective. This Court should not." 316 U. 624, at p. 635.

ceeding 40, the rate being determined by the formula, $49.00 divided by 49 equals regular hourly rate. Because there is no increase in the agreed weekly pay until the hours worked exceed 46, the agreement is invalid, says the Court below. That is this case.

(b) The parties agree upon a regular weekly wage of $40 per week for the first 40 hours work. They also agree upon an overtime rate of 150% for hours worked in excess of 40 and further agree that the regular workweek shall be 46 hours. By virtue of the agreement to work a regular workweek of 46 hours, the regular weekly pay is the same as in example (a) or $49.00. In practical effect, the agreed weekly pay is also $49.00 and the agreement is invalid under the Second Circuit test because the agreed weekly pay is not exceeded until the hours exceed 46 per week.

(c) The parties agree upon an express hourly rate of $1.00 per hour, an overtime rate of 150% that rate or $1.50 per hour for hours exceeding 40 per week and a regular workweek of 46 hours. Again, in practical effect, by virtue of the agreement to work a regular week of 46 hours, the agreed weekly pay is $49.00 as in both examples (a) and (b). As in those cases the agreement would be invalid, according to the Circuit Court.

Until the Second Circuit's decision in the present case, there would have been no reason for doubting the validity of plans (b) and (c). Under the *Missel* case, the regular hourly rate in examples (b) and (c) would be $1.00 per hour, the former by calculation, the latter by agreement.

In the light of the reasoning above, must employers and employees bargaining for wage agreements in industries having stable or regular workweeks, refrain from agreement on or specification of any regular workweek beyond 40 hours per week?

Assuming in examples (b) and (c) there was no agreement on or specification of the regular workweek but the

record showed a regular practice of working 46 hours, would not the Second Circuit find implied agreement to work 46 hours and condemn the arrangement?

During the war emergency the standard workweek in American industry became 48 hours or more. (Executive Order No. 9301.) In this period of manpower shortage when the NWLB Agreement was effective, were all labor agreements of the type illustrated by examples (b) and (c) which called for a workweek of 48 hours or more invalid for the reason stated by the Court below?

If the Second Circuit is sustained the only way to avoid that result is to draw a distinction between a contract for a fixed workweek and fixed weekly wage reducible by formula to an hourly rate on one hand and a contract for a fixed hourly rate and a fixed workweek converted by formula to a fixed weekly wage on the other hand. In other words, though the practical effect and result are identical, legality under the Act depends on whether the parties resort to division or multiplication.

The test advanced by the Second Circuit as the controlling one in this case finds no judicial support elsewhere. Certainly not in this court. The freedom of contract emphasized by the decisions of this Court under Section 7(a) discussed at the beginning of this argument, sanctions agreements by employers and employees upon a weekly "take home" pay, including overtime and subject to reduction by formula to an hourly rate, unless the purposes of the Act are thereafter evaded by total disregard of the hourly rate thus bargained.[9]

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[9]The case of *Watkins* v. *Hudson Coal Company*, 151 F. 2d 311 (C. C. A. 3) was cited against this proposition in Respondent's brief opposing certiorari in this case. However, in the *Watkins* case, the Court found that the hourly rates derived from the formula had not been applied and were, therefore, fictitious. The

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If the rates derived from the formula are the rates actually paid for non-overtime hours and for overtime hours a premium of at least 150% of the formula rates is paid, then inevitably the purposes of the Act are fulfilled. So, in essence, the question remains: Were the formula rates actually used in determining regular, non-overtime pay to the employees or were they merely a paper fiction having no demonstrable effect in determining their compensation?

(c) Circuit Court Ignored Record Facts Demonstrating Reality of Contract Rates.

The Circuit Court, while recognizing that the hourly rates derived from the formula were applied for purposes of overtime beyond the agreed regular workweek of 46 hours (which, incidentally, was the only demonstrable effect of the stated hourly rate in *Walling* v. *Belo*, 316 U. S. 624) totally disregards the fact, as found by the District Court, that these rates were actually used in determining compensation for both non-overtime and overtime hours when the employees worked less than the regular workweek. When an employee failed to report for work without excusable cause such as illness, and worked 40 hours or less per week, he was paid only for the hours actually worked on the basis of the formula rate. While there are no instances reflected in the pay-

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formula in that case under which the miners were never docked more than the regular daily rate regardless of the reason for absences, was also held bad because the rate derived did not "bear a real relation to actual earnings." This is merely another way of saying that a formula rate is invalid unless it is the rate actually paid for the non-overtime workweek, which was true of the formula rates in this case and in the earlier *Shepler* case in the Third Circuit, 140 F. 2d 371. Certiorari was denied in the *Watkins* case 327 U. S. 777, but no question involving the formula was presented by the petition.

Apparently the first Administrator of the Wage and Hour Division agreed even as to employees customarily unorganized. See footnote at p. 630 in *Walling* v. *Belo*, 316 U. S. 624.

rolls, if an employee in such a case worked more than 40 hours but less than 46, under the agreement he would have been paid the formula rate for the first 40 hours worked and time and one-half the formula rate for the hours beyond 40. It was so stipulated (R. 143-144). Where the hourly rate was applied for workweeks of less than 40 hours it could not be assumed that the rate would have been ignored for workweeks exceeding 40 hours but less than the regular workweek of 46 hours.

These facts, ignored by the Circuit Court, demonstrate positively that the formula rates were the real rates and that the petitioners paid a 50% premium for all hours exceeding 40 per week and not merely those exceeding the regular workweek of 46.

(d) Contractual provisions relating to excusable absences and holidays do not vitiate the contract rate as "the regular rate".

There are two types of cases reflected on the payrolls in this case where employees actually working less than forty (40) hours per week received more than the contract rate for hours worked. These situations were expressly treated by the stipulation of facts and there can be no justified basis for speculation about the proper interpretation of the payrolls on these points.[10]

The contractual provisions whereby employees did not lose the benefit of their normal overtime pay because of

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[10] Defendants' Exhibit B (R. 141-146):

"* * * 2. That throughout the period succeeding September 5, 1942, the situations referred to in the following subdivisions hereof were taken care of in the manner therein severally set forth as follows:

"(a) When during any workweek an employee was absent for part of that workweek because of 'sickness, or other excus-

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excusable absences for reasons such as their own illness, family sickness, deaths or funerals, or because of recognized holidays, shows no evasive departure from the contract rate in the "normal, non-overtime workweek". Obviously, such weeks are not "normal". If the payments made during such weeks are used to impeach the bona fides of the contract rate, then employees are to be penalized for following established and liberal practices. Many employers affected by the NWLB Agreement undoubtedly paid a full week's wage when absences were excusable. This is a common practice in business. Is ordinary kind-

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able causes' and therefore actually worked less hours than regularly scheduled, he was paid for those hours which would, but for those excusable absences, have exceeded 40 hours, at the rate of time and one-half the hourly rate as computed under the National War Labor Board agreement hereinafter in this paragraph 2 referred to as 'the contract'. Thus, an employee regularly scheduled to work 46 hours during the workweek who was absent for illness for two days (or 16 hours) was shown on the payrolls as working 24 hours of straight time for a compensation of 24 times the hourly rate as computed in the contract and six hours of overtime for a compensation of six times one and one-half times the hourly rate as computed in the contract. This was done pursuant to Sub-Division 5 (i) of Section III (Page 29 of Plaintiffs' Exhibit 1). For example, see Plaintiffs' Exhibit '6', payroll of Peterson, December 13 to December 19, 1942."

* * * *

"(d) Holidays not worked but paid for were treated as time worked in computing overtime hours under the National War Labor Board Agreement. Holidays, not worked, which are indicated by the symbol 'HD,' are not shown as hours worked, but the employee is credited with those number of hours which normally and except for the holiday would have been designated as overtime hours and paid therefor at the rate of one and one-half times the hourly rate as computed in the contract. Thus, an employee who did not work but was paid for a holiday (8 hours) is shown as working 38 hours and receiving compensation therefor at 40 times the hourly rate as computed in the contract and six times one and one-half times the hourly rate as computed in the contract. For example, see Plaintiffs' Exhibit '6', payroll for November 22 to November 28, 1942."

ness and decency in employer-employee relations to be penalized by saying that an overpayment of this character destroys the reality of the contracted hourly rate?

During the war emergency by virtue of Executive Order 9240, war contractors were required in certain cases and permitted in others to treat certain designated holidays, though not paid for, as working time for purposes of computing overtime.[11] Inevitably this practice has continued and will continue in post-war labor agreements. The salutary purpose of these provisions is identical with that of the NWLB Agreement, to save the employee from loss of overtime where his absence is without fault or because of shutdowns due to recognized holidays. Any interpretation of the Act which gives weight to these and similar practices as evidence that the contract rate has not been applied in non-overtime workweeks, punishes enlightened labor relations, hamstrings collective bargaining and injures those for whose benefit the Act was passed.

The Circuit Court's ruling leads to an unrealistic and unmoral result. It takes an unambiguous contract, entered into after protracted negotiations and under the direction of a governmental agency—and a contract under which the parties have operated with mutual recognition of their mutual intentions—and proceeds to destroy its wage provisions and substitute for them a wage rate which is not based on agreement, *quantum meruit* or statute.

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[11] Opinion of Secretary of Labor on meaning of Premium Pay Order, Interpretative Bulletin No. 1, issued February 18, 1943:

> "18. For purposes of computing the seventh day of work in a workweek under the Order, the designated holidays must be included in the count whether or not work is performed on such days. An idle holiday should be included in computing the sixth day worked in the workweek unless the employment contract specifies otherwise."

We submit that where there was no overreaching and the intention of the parties and the National War Labor Board was to comply with the Act, every reasonable presumption and inference should be relied upon to avoid an unconscionable result.

II

CONCLUSION

The judgment of the Court below should be reversed.

Respectfully submitted,

WALTER GORDON MERRITT,
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of Counsel.

Dated: January, 1947.

Appendix A

Hourly Rates of Respondents under Sloan Agreement as of April 20, 1942 Computed on *Missel* Formula and for Period, April 21, 1942 to December 10, 1943 Computed in Accordance with NWLB Agreement.

Plaintiff's Name	Period	Rates Hourly.
Del Rio	Sloan Agreement 4/20/42	.532
	4/21/42— 8/ 8/42	.544
	8/10/42— 4/20/43	.561
	4/21/43—12/10/43	.589
Manne	Sloan Agreement 4/20/42	.532
	4/21/42— 8/ 8/42	.544
	8/10/42— 4/20/43	.561
	4/21/43—12/10/43	.589
McCole	Sloan Agreement 4/20/42	.416
	4/21/42— 6/13/42	.392
	6/15/42— 8/ 8/42	.401
	8/10/42— 4/20/43	.45
	4/21/43—12/10/43	.473
Peterson	Sloan Agreement 4/20/42	.532
	4/21/42— 8/ 8/42	.544
	8/10/42— 4/20/43	.561
	4/21/43— 8/ 7/43	.589
Torra	Sloan Agreement 4/20/42	.596
	4/21/42— 8/ 8/42	.604
	8/10/42— 4/20/43	.622
	4/21/43—12/10/43	.651
J. H. Berger*	as of 4/20/42	.833
	4/21/42— 9/12/42	.769
	9/14/42— 3/20/43	.865
	3/21/43—12/10/43	.962
Rodriguez (Sanchez)*	as of 4/20/42	.638
	4/21/42— 8/ 8/42	.577
	8/10/42— 1/25/43	.612

* Berger and Rodriguez were not members of Local 32-B and not subject to NWLB Agreement as such.

Office - Supreme Court, U. S.
FILED
FEB 10 1947
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 497

149 MADISON AVENUE CORP. and WILLIAMS & CO., INC.,
Petitioners,

against

FRANK ASSELTA, CAMILO DEL RIO, JOSEPH MCARDLE, SAMUEL MANNE, CORNELIUS MCCOLE, BURTON PETERSON, FRANK RODRIGUEZ, JAMES TORRA, JOHN H. BERGER and GEORGE BERGER,
Respondents.

PETITIONERS' REPLY BRIEF

WALTER GORDON MERRITT;
ROBERT R. BRUCE,
Counsel for Petitioners.

JOHN J. BOYLE,
of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 487

149 MADISON AVENUE CORP. and WILLIAMS & CO., INC.,

Petitioners,

against

FRANK ASSELTA, CAMILO DEL RIO, JOSEPH McARDLE, SAMUEL MANNE, CORNELIUS McCOLE, BURTON PETERSON, FRANK RODRIGUEZ, JAMES TORRA, JOHN H. BERGER and GEORGE BERGER,

Respondents.

PETITIONERS' REPLY BRIEF

The brief on behalf of the Administrator of the Wage and Hour Division, as *amicus curiae*, filed belatedly, raises two false issues. First, the claim that this case involves what the Administrator calls an "X-formula" (see pp. 11 to 14 inclusive of his brief) where the formula or contract hourly rate varies with the number of hours worked, displays an amazing lack of candor regarding the stipulated facts of record and the findings of the District Court. Second, the Administrator's constant endeavor to draw a distinction between the statement of an hourly rate and a formula for calculating the hourly rate where all factors are known in advance and stated in the contract, ignores the rules of simple arithmetic.

On one issue only—which we accept as the only true issue before this Court—does the Administrator come

to grips with the facts of this case: Were the contract hourly rates computed under the terms of the National War Labor Board Agreement the real rates by which respondents' compensation was determined? As stated in the very first sentence of his Summary of Argument: "The validity of the compensation plan in the instant case depends upon the genuineness of the hourly rates employed by petitioners."

I

Answering Administrator's Point I—The contract formula for computing hourly rates is not artificial.

A. The claim that the formula was a so-called "X-formula" producing a varying hourly rate dependent upon hours worked is an inexcusable misstatement—later contradicted in the Administrator's own brief and repudiated by Respondents.

At page 12 of his brief, the Administrator says: "Although the X-formula in the contract here provides a means for determining hourly rates, we believe that rates determined in this manner are not genuine rates, particularly *where the divisor of the weekly wage is stated to depend upon the hours actually worked* * * *. The rates derived from use of the formula have no independent significance in determining the employees' compensation *because they fluctuate from week to week and are not known until the number of hours actually worked are known*" (italics ours).

Two pages later, the Administrator contradicts himself (see pp. 14 to 15): "Instead of dividing the weekly wage by the number of hours employed plus one-half the number of hours *actually* employed in excess of 40 hours, petitioners divided by the *scheduled* number of hours plus one-half the *scheduled* hours in excess of 40, namely, by 61 in the case of watchmen and 49 in the case of other

employees * * *. Without considering the effect of employing hourly rates calculated in a manner not provided in the contract, it may be conceded that computation of the hourly rates in this method somewhat lessens their artificiality *since they are known in advance once they have been computed.* * * * *The use of 61 or 49 as the divisor* of the agreed weekly wage rather than the actual number of hours for which it was paid at once suggests a fictitious mode of calculation'"* (latter italics ours).

Obviously the Administrator has jumped on his white steed and dashed recklessly off in opposite directions! The reason for this strained effort will be apparent later.

In partial mitigation of his offense, the Administrator would probably plead that he was confused by the District Court's reading of the literal language of the formula as calling for a variable hourly rate. (see footnote 5 of Petitioners' Brief, pp. 15-16). But the District Court found (R. 173, 198) that:

> "In fact they (the contract rates) did not so vary, but remained the same from week to week as if the plaintiff (sic) actually worked only the regular workweek."

However the District Court or the Administrator may have read the formula, they were not free to disregard the

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* The use of such fixed divisors suggests nothing of the kind. Where by agreement the weekly wage for a fixed workweek includes overtime at 150% of the contract hourly rate, as here, the only possible divisors are those used in the N. W. L. B. Agreement since the divisors exactly state in equivalent hours of compensation the amount of the agreed weekly earnings. As stated throughout Petitioners' brief, and as must be obvious, the formula in the setting of this agreement is simply an algebraic restatement of the Act's overtime requirements. See also for a more extended demonstration of this fact, Brief for Midtown Realty Owners' Association, Amicus Curiae, pages 18 to 20, and Brief for 128 West 30th Street Corp. et al., Amici Curiae, pages 20 to 26.

stipulated facts and the actual interpretation of the N. W. L. B. Agreement as evidenced by the payrolls and the War Labor Board's explanation of how the formula operated.

It was stipulated that respondents "were employed and paid in accordance with the terms and conditions of employment provided in a collective bargaining agreement known as the National War Labor Board Agreement" (Pl. Ex. 2, R. 120-121).

The payrolls show that respondents were paid on the basis of fixed hourly rates (Pl. Ex. 6, pp. 36-103).

The War Labor Board's explanation of the formula shows the same thing (see example at bottom of p. 70 and top of p. 71, Pl. Ex. 4).

The real reason for this false excursion by the Administrator appears at pages 18 and 19 of his brief in the *Halliburton* case, Docket No. 74 filed with this Court in September 1946 before the instant petition in Docket No. 497 had been granted. Relying on certain loose language of the Circuit Court below in our case which also ignores the facts of record and the finding of the District Court, the *Asselta* case is grouped with other circuit court decisions as illustrative of the "X-formula." In his long and patient effort to reverse this Court's decision in the *Belo* case, the Administrator found comfort in decisions of various circuit courts condemning the "X-formula." The language of the Second Circuit Court in our case seemed particularly appropriate for that effort. Faced with Supreme Court review of the *Asselta* case and exposure of error in his ill chosen prop, the Administrator's brief has sacrificed candor for consistency.

Respondents' brief (p. 6) tacitly concedes the obvious fact that the formula produced fixed hourly rates. But respondents go astray as did the District Court, in refus-

ing to believe that it is ever legally possible under any circumstances to derive an hourly rate from an agreed weekly wage for specified hours, inclusive of overtime.

B. The constant assumption that this was not an express hourly rate contract or its equivalent, ignores the teachings of simple arithmetic.

At page 8 of his brief, the Administrator says: "The failure to agree upon specific hourly rates and the artificial manner of their computation strongly indicate that the formula hourly rates were fictitious."

We have already dealt with the claim that the formula method of computing rates in this case is artificial. The constant assumption that there was "failure to agree upon specific hourly rates" (see, Administrator's brief, pp. 8, 10 and 11) is wholly inconsistent with the grudging admission (p. 15) "that computation of the hourly rates in this method somewhat lessens their artificiality since they are known in advance once they have been computed".

We had not thought it necessary in this case to demonstrate at length that a contract which specifies that the hourly rate shall be computed by dividing an agreed weekly wage of $49.00 inclusive of overtime by 49 is the same as a contract stating the hourly rate to be $1.00 per hour.

The Administrator's brief does not spell out the reasons for his stubborn assumption on this point except by reference (p. 11) to his brief as petitioner in *Walling v. The General Industries*, Docket No. 564. Examination of the latter brief discloses (pp. 12 to 17) that the Circuit Court cases there relied on refused to spell out an hourly rate solely from an agreement, express or implied, that the stated salary included overtime. The reason is plainly

stated at page 14: "Obviously it is not the function of the courts to allocate this or the other salary increases * * * to regular time and overtime. *Walling* v. *Harnischfeger* Corp., 325 U. S. 427. As stated in the concurring opinion of Mr. Justice Frankfurter: 'It should not be left to courts to work out a hypothetical mathematical interpretation which, if it corresponded with the actual arrangement, could satisfy the statute.' "

In our case, nothing has been left to the courts either by way of implying an agreement to include overtime in the weekly wage for the fixed regular workweek or by way of allocation. As we stated in our main brief (p. 22) "Allocation of non-overtime earnings and overtime is precisely the function of the formula. In the formula the hourly rate necessarily reflects all non-overtime payments for the regular workweek."

The Circuit Court below after observing that "the parties did not see fit to agree upon the basis of a designated regular hourly rate of pay for a statutory workweek *expressed simply in terms of dollars and cents*"* (italics ours), seems to concede there is really no difference in fact or law between a stated rate and a derivative rate (R. pp. 82-83).

Finally, it does seem rather absurd for the Administrator to deny the existence of specific hourly rates in the face of the payrolls (Pl. Ex. 6, pp. 36-103).

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* The remainder of the Circuit Court's suggestion at this point that the parties retained "the previous weekly wage" is, of course, contrary to the facts. See Tables 1 and 2 of Brief for 128 West 36th Street Corp., et al., *Amici Curiae*, pp. 31, 32; see also Appendix A of Petitioners' Brief.

II

Answering Administrator's Point II—The contract hourly rates were operative rates and not artificial. Certain minor features of the agreement emphasized by the Administrator do not establish the contrary.

The Administrator endeavors to prove generally that the real rates were the agreed weekly wages, not the contract hourly rates as computed under the formula. It is argued that under certain circumstances when respondents worked fewer hours or more hours than their regular workweek, the amounts paid them "directly reflected" the agreed weekly wage. It is further argued that "in workweeks of scheduled hours the weekly wage was always paid even though the application of the formula rates frequently equalled a slightly different amount" (p. 16).

Much of the Administrator's argument on this score is answered in petitioners' main brief. Our reply is limited to new points not heretofore advanced by respondents in the courts below or to new emphasis on old matters.

(a) *Deductions for absences.*

The Administrator's surprising argument that petitioners paid respondents too much money (i. e. more than the contract hourly rates) when they were ill or otherwise excusably absent, has been answered in our main brief (pp. 29-31). We merely point out that the amounts paid in the short workweeks do not "directly reflect" any weekly wage or an average hourly rate (i. e. inclusive of overtime). The Administrator's own tabulation (footnote 12,

pp. 20-21) shows that the amounts paid exceeded the proportionate share of the weekly earnings.*

(b) *Premium Rates (175% of contract rate) for hours beyond scheduled workweek or workday.*

Here again the Administrator seeks to penalize the employer for paying a premium for certain overtime hours in excess of the 150% rate required by Section 7(a) of the Act. Here again is the same failure to recognize that these special premiums relate to unusual and abnormal situations where the employee works more than 9½ hours per day or 46 hours per week. (Watchmen were paid 200% of the contract rate or double time for hours beyond 11½ per day, or 54 per week.)

The asserted equivalence between overtime at 175% of the contract rate for hours beyond the regular workweek and overtime at the statutory rate of 150% on the agreed weekly wage, as proof that the weekly wage was the real rate, fails because there is no equivalence. For example, taking an employee whose contract rate is $.561 per hour, his earnings for a 54 hour workweek (8 hours beyond the regularly scheduled workweek) would be 40 x .561 = $22.44 *plus* 6 x .843= $5.06 *plus* 8 x .98 = $7.84 or a total of $35.34. If the employer intended to pay statutory overtime only on hours beyond the scheduled workweek, he has failed since on that basis he would have paid $27.50 (for 46 hours) *plus* 8 x .895 = $7.16 or a total of $34.66.

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* Administrator's citation of *Walling* v. *Helmerich & Payne, Inc.*, 323 U. S. 37, as condemning payment of overtime compensation for non-overtime hours, is most inapposite. Here excusable absences are treated as time worked so the employee won't lose the benefit of overtime where not at fault. There overtime was paid regularly within the normal workday as part of a scheme to maintain the old wage scales.

(c) *The unused provision for "per diem" rates.*

The Administrator points to a general clause in the contract (Pltf's. Ex. 1, p. 32) providing a method for calculating "per diem" rates as being inconsistent with the contract rates computed under the formula. If this clause had ever been used at all, especially in the case of employees whose hourly rates were computed under the formula, the Administrator might have an argument. But there is no evidence that it was ever applied or intended to be applied. This was a general clause carried over blindly from the prior Sloan Agreement (Pltf's. Ex. 3, p. 15) without consideration of its irrelevance under the terms of the N. W. L. B. Agreement.

This strained argument again indicates the Administrator's determination to reach a particular result regardless of fact.

(d) *Contract rates for part time employees.*

The fact that Bilbow (who was not even a plaintiff in the action but whose wages are shown on the payrolls in evidence) received an hourly rate of $.51 per hour while acting as a relief watchman—virtually the equivalent of the *average* hourly rate, inclusive of overtime, paid McCole, the regular watchman for his regular workweek—does not prove that McCole's contract rate of $.45 per hour was artificial. The equivalence resulted from the fact that McCole regularly worked overtime. It does not appear that he ever worked less than his regularly scheduled workweek of 54 hours. Had he done so, he would have been paid, as stipulated (R. p. 143), on the basis of his $.45 rate for the first 40 hours worked and 150% that rate for excess hours unless his absence was excusable. Thus, if McCole had worked only 42 hours he would have been paid 40 x $.45 = $18.00 plus 2 x $.675 = $1.35, or a total of $19.35. His average rate for that week would then be $.46.

As a matter of collective bargaining the parties quite rationally established a higher hourly rate for employees who had no opportunity to earn overtime pay despite their different practice before the application of the Act made consideration of overtime a relevant factor in the adjustment of rates between men in the same occupations.

It is difficult to comprehend how it demonstrates that the hourly rate of a regular employee was not his real rate of pay.

(e) *Admittedly "slight" payroll discrepancies during regular workweeks.*

Both the Administrator's brief and Respondents' brief refer to payrolls where the extension of the stated hourly rate for 40 hours and of the stated overtime rate for the 6 overtime hours, result in a deficiency of 4 cents. Since the agreed weekly wage was then always paid for the regular workweek, it is argued that the rate had no function or vitality.

The payroll for the week ending November 20, 1943 (Pl. Ex. 6, p. 100) is an example. There respondent Manne's hourly rate is stated as $.589 and his overtime rate as $.884. Earnings for the first 40 hours are stated as $23.59, whereas 40 x $.589 = $23.56. Overtime for the last 6 hours are stated as $5.31, whereas 6 x $.884 = $5.30. The discrepancy is only apparent, not real. For had the bookkeeper carried the regular rate to four decimals it would be $.5897 per hour and for 40 hours would be $23.59. By the same token, the overtime rate would be $.885 and and for 6 hours would be $5.31.

The payrolls after the week ending October 16, 1943 when a wage increase was first made effective (Pl. Ex. 6, p. 94) reveal an obvious error in the case of McCole.

His stated hourly rate is $.48 per hour, his overtime rate $.69 per hour. That it was an error by the payroll clerk appears from the fact that this obvious understatement of the overtime rate continues for a number of weeks thereafter.

The misstatement of the contract rates in workweeks when respondents worked their regularly scheduled hours are of little consequence if the employees received their agreed weekly earnings, which it is stipulated they did. Indeed, the application of the *de minimis* principle seems entirely appropriate in the situation. It is a trifling matter when the larger interests implicit in this collective bargaining agreement are considered.

If we are correct in our argument that it is consistent with the Act to agree upon weekly earnings inclusive of overtime subject to allocation thereof by formula into regular and overtime rates, the relevant test is the application of the contract rates where hours are worked less than or beyond the scheduled workweek. The contract rates were then applied, not proportionate weekly rates. The fact that more than the proportionate weekly rates was paid in certain special situations heretofore discussed does not establish the weekly earnings for the scheduled workweek as the real rates or destroy the vitality of the contract rates.

(f) *The retroactive wage payments.*

The increase of $1.40 per week for the regular workweek granted in October 1943 retroactive to April 21, 1943, included both straight time and overtime pay, as the Administrator correctly states. While the payroll (Pl. Ex. 6, p. 97) shows an effort by petitioners to make an appropriate adjustment for employees who worked beyond the scheduled workweek during the retroactive period,

it is apparent that adjustments were not made on the basis of the new hourly rate where fewer hours than the scheduled week had been worked. If the contract hourly rates controlled compensation during this period in fact, the payment of a retroactive increase including overtime, even though overtime was not worked, should not be permitted to destroy the fact of interim compliance. Again the vice, according to the Administrator, is that some people received too much money. Picayune adjustments by employers in such a situation might easily breed disputes and grievances. "In light of the realities of the industrial world", petitioners here should not be penalized for using common sense.

III

Answering certain points in respondents' brief.

Both respondents and the Administrator seem to proceed on the erroneous theory that between April 20, 1942 and September 1, 1943 when the N. W. L. B. Agreement was signed, the *status quo* under the prior Sloan Agreement was maintained and that overtime liability under the Act accumulated each week which no new agreement could satisfy except by full payment of the overtime liability plus liquidated damages of equal amount. This overlooks the fact that the Sloan Agreement had expired and the Union on behalf of respondents and its members had agreed that the new wages and hourly rates would be retroactive to April 21, 1942 (R. 133-134). No liability for overtime could fairly accrue until the wages were known and agreed upon by the parties. Interim payments were only tentative payments on account. When the retroactive payment of a sum equivalent to $2.50 per week was made it was paid and accepted on the understanding that it included compensation for overtime on the basis of the newly

agreed rates. Undoubtedly some employees who worked no overtime in certain weeks were overpaid; others who worked beyond the scheduled workweek of 47 hours then prevailing may not have been paid enough. Again these circumstances should not invalidate the payments to those who received their full amount. At best those underpaid, if any, might have some small claim.

Respondents say that sanctioning the retroactive operation of the N. W. L. B. Agreement would fail "to fulfill the purpose of the Act to limit the number of overtime hours demanded by employers who were not—contemporaneously—bound to pay time and one half for overtime" (p. 16). This misconceives the effect of Section 7(a). The Act does not limit overtime hours. It makes them more costly than non-overtime hours. Moreover, the employers were contemporaneously bound to observe the Act by its own force. There was no contract and no agreed wages. Once terms were agreed upon, the employers, including petitioners, were liable on the basis of the new wage scales for whatever overtime had been worked.

As demonstrated by Appendix A attached to petitioners' brief, the N. W. L. B. Agreement resulted in hourly rate increases for all members of Local 32-B as contrasted with their hourly rates under the prior Sloan Agreement (except as to McCole, the watchman, for a limited period up to August 10, 1942). J. H. Berger and Rodriquez were not members of Local 32-B and not subject to the requirement of that agreement that the hourly rate would not be lowered. Actually in Berger's case, his hourly rate increased substantially after September 14, 1942.

Hence, the table at page 11 of respondents' brief and the conclusions drawn from it are without real foundation. The suggestion that the War Labor Board did not understand the effect of its directive as to wages and hours does real injustice to the caliber of the men on the Panel

and the Board.* It is clear that in fixing wages for loft buildings they were adopting the wage scales and the formula for computing hourly rates then in force in the Garment Center (Pl. Ex. 4, pp. 27, 33-34, 70-71). They understood that because of the prospective application of the Fair Labor Standards Act, "take home" pay had to be integrated with agreed hourly rates and that it was the function of the formula to specify the rates. They understood that the hourly rates ordered by them were necessarily lower than they would have been if wage scales had been fixed solely in terms of a weekly wage which would have defeated their purpose of harmony with the Meyer Agreement.

The employees received substantial increases in "take home" pay by virtue of the N. W. L. B. Agreement. It is pure speculation to suggest they would have rejected their own Union's agreement if hourly rates had been expressly set forth in the document itself. The increases actually gave them more than the Act would have required on the basis of the Sloan Agreement wages. In any event they could not have been misled because it was not judicially determined until several years later that the Sloan Agreement wages were inadequate under the Act. *Adams* v. *Union Dime Savings Bank*, 144 F. 2d 290, cert. den. 323 U. S. 751 (1944).

Finally, whatever the propriety of respondents' reference to the Frankenthaler Agreement (p. 17), it is clear that the Union has now achieved the 40 hour week which the Act did not require as an absolute standard but set

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* The comparison by the Panel between hourly rates in Class "C" lofts and Class "A" apartments where the average hourly rate of $.59 is used instead of the formula rate of $.561 reveals no misunderstanding or "real feeling" about the formula. The use of the average rate in this case was the only true method of comparison since apartments were not subject to the Act and did not pay overtime after 40 hours per week.

as a goal gradually to be achieved under the compulsion of punitive overtime. The National War Labor Board Agreement was a step in the process of this evolution. There is no reason for believing that this Court's seal of approval on that agreement to which the Union pledged its faithful adherence, would or could turn back the clock.

Respectfully submitted,

WALTER GORDON MERRITT,
ROBERT R. BRUCE,
Counsel for Petitioners.

JOHN J. BOYLE,
of Counsel.

February 8, 1947.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 49

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140 Madison Avenue Corp. and Williams & Co., Inc.,

Petitioners,

against

Frank Asselta, Camilo Del Rio, Joseph McArdle, Samuel Manne, Cornelius M. Cole, Burton Peterson, Frank Rodriguez, James Torra, John H. Berger and George Berger,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

WILBUR DUBERSTEIN,
FREDERICK E. WEINBERG,
Counsel for Respondents.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No.

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149 MADISON AVENUE CORP. and WILLIAMS & CO., INC.,
Petitioners,

—against—

FRANK ASSELTA, CAMILO DEL RIO, JOSEPH McARDLE, SAMUEL MANNE, CORNELIUS McCOLE, BURTON PETERSON, FRANK RODRIGUEZ, JAMES TORRA, JOHN H. BERGER and GEORGE BERGER,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

Statement.

The Circuit Court of Appeals, Second Circuit, unaniniously affirmed a judgment in favor of the Plaintiffs' Respondents' entered in the United States District Court, Southern District of New York, upon a decision of the Honorable William Bondy, United States District Judge (pp. 81-5). The trial comprised six days and was without a jury (205). The decision of the Circuit Court was accompanied by an opinion *per curiam* (pp. 81-4).

Judgment appealed from (205-210).

Decision and Opinion of the Trial Court (184-202).

Findings of Fact and Conclusions of Law (160-182).

Opinion of the Circuit Court of Appeals delivered upon the decision of affirmance (pp. 81-4).

The Nature of the Action.

This was an action brought by certain service employees of a loft building operated by the defendants to recover additional compensation, liquidated damages and attorneys' fees allegedly due under 29 U. S. C. A., Sections 207, 216(b) also known as the Fair Labor Standards Act of 1938. Under a stipulation entered into while the appeal was pending in the Circuit Court, the defendants paid the sums due for the employment period prior to April 20, 1942 and expressly conceded that the entire employment period was covered by the provisions of the Act (216-221). The effect of that stipulation was to confine the appeal to the question of whether the defendants, during the period succeeding April 20, 1942, had paid the plaintiffs for their overtime hours at the rate of at least 1½ times the regular rate of employment as required by Section 207(a) of the Fair Labor Standards Act.

The Facts.

The Fair Labor Standards Act, effective October 24, 1938, provided that any hours worked above a stated maximum workweek in affected industries must be compensated at the rate of not less than 1½ times the regular rate of employment. For the period with which we are here concerned, the maximum statutory workweek was fixed at 40 hours. 29 U. S. C. A., Section 207(a). It was further provided that non-compliance with this provision would render the employer liable for the payment of additional sums as

liquidated damages and attorneys' fees (id., Section 216).

Throughout the period of approximately 4 years which had intervened between the effective date of the Act and the period of employment with which we are here concerned, these defendants, together with the employers of service employees in loft buildings in the New York City area generally, had been acting in clear violation of the Fair Labor Standards Act. That gave rise to the liability which was paid and the corresponding claim severed from the present suit while the appeal was pending in the Circuit Court of Appeals (216-219). During that period these plaintiffs had been hired for workweeks fixed at 47 and 48 hours (in the case of the night watchman McCole, at 60 hours) and had been receiving compensation for such excessive workweeks in the form of fixed weekly wages (129-132; Ex. 3).

During that earlier period it had been the defendants' constant cry that the Fair Labor Standards Act was inapplicable to the employment of the maintenance and service operatives in loft buildings irrespective of the character of the business conducted by the tenants, and that for that reason the Act was not being violated. This situation was theoretically corrected by two decisions of this Court which were handed down during the early part of June, 1942. In *Kirschbaum v. Walling*, etc., 316 U. S. 517, this Court held that the employment of service employees in buildings of which substantial portions were occupied by tenants in the production of goods for interstate commerce came within the purview of the Fair Labor Standards Act. One week later this decision was supplemented by the decision in *Overnight Motor Trans-*

portation Co. v. *Missel*, 316 U. S. 572, which held that, where the compensation of an affected employment is upon a weekly basis, the regular hourly rate for the calculation of overtime compensation is the quotient of the weekly wage divided by the number of hours worked during the week.

We may pause briefly at this point. The *Kirschbaum* and *Missel* decisions marked a turning point in the history of employment agreements affecting the service and maintenance operatives of loft buildings. Before the announcement of these decisions, payment of a flat weekly wage for a workweek which was substantially longer than the maximum workweek fixed in the Act had been defended upon the ground that the provisions of the Act were inapplicable to such employment. Thereafter that argument was no longer available. After the announcement of these two decisions, it became clear that, if the employers were to continue to use the extra-statutory workweek at a fixed weekly wage, they would have to find some rationalization other than the claim of the inapplicability of the Act. *Adams* v. *Union Dime Savings Bank*, 144 Fed. (2nd) 290, cert. den. 323 U. S. 751.*

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* While the new open shop agreement with which we are here concerned was entered into after the *Kirschbaum* and *Missel* decisions had actually been announced (Ex. 1), the new closed shop agreement had been entered into some months before. In both cases, however, the formula hereafter described was adopted for the concealed purpose of meeting the situation presented by "the prospective application to loft buildings of the Fair Labor Standards Act" (Ex. 4, p. 70, ll. 3-4). The adoption of the formula in the new closed shop agreement was in anticipation of, whereas its adoption in the new open shop agreement was with actual knowledge of, the *Kirschbaum* and *Missel* decisions.

Before examining the nature of the scheme through which these defendants and others had hoped to continue to hire their employees for extra-statutory workweeks at flat weekly wages, we may briefly consider certain of the reasons why the employers have always been so anxious to avoid computing the compensation upon the basis of hourly rates.

One of the important reasons for the employer's desire to fix the compensation upon the basis of a flat weekly wage for a given workweek arose from the circumstance that it enabled him to acquire a bargaining advantage from a certain blind spot which most employees have in common. The employers know that the principal concern of the employee or his union always rests in the amount of the take-home pay at the end of the week. Such additional considerations as the length of the hours or the character of the working conditions are, save only in those now unusual instances where hours or working conditions are oppressive in the extreme, treated as secondary. Accordingly, if an employer can deal with his employees upon the basis of a flat weekly wage for a fixed workweek, the latter will invariably be predisposed to treat the number of hours worked as unimportant. Then the employer, by adopting a form of agreement in which the extra length of the workweek is taken for granted, will invariably be able to pay the same price for, say, a 46 hour workweek which he might otherwise have had to pay for a 40 hour workweek. For that reason, the ability to fix the terms of employment upon the basis of a flat weekly wage for an extra-statutory workweek has always been a cherished bargaining mechanism in the eyes of the employer—a veritable *coup d'etat* which,

Fair Labor Standards Act or no Fair Labor Standards Act, he has been loath to relinquish.*

Sometime during 1942 a formula was adopted, first in the closed shop agreement and later in the open shop agreement, whose purpose was to avert "the prospective application to loft buildings of the Fair Labor Standards Act", to standardize a workweek of "at least forty-six (46) hours a week" and "to offset the full overtime costs which would ensue if hourly rates were computed in the ordinary way" (Ex. 4, p. 70, paragraphs 1 and 3). It is to this formula and the collective bargaining agreement in which it was adopted that we must now turn.

The new collective bargaining agreement was entered into on September 1, 1942 between the Realty Advisory Board on Labor Relations, Inc. representing the employers including these defendants and Local 32B of the Building Service Employees International Union representing the service employees including these plaintiffs (Ex. 1). Although the cover of the agreement bore the legend "National War Labor Board Agreement", the National War Labor Board itself was not a party thereto (id.).

Under that agreement workweeks for employees other than watchmen were fixed at 46 hours per week and for watchmen at 54 hours per week (Ex. 1, pp. 27-8). It then fixed minimum weekly wages, the exact amounts of which were determined by the area of the building (id., p. 25). It has been stipulated that throughout the period with which we are here

* In the case at bar there was a still additional value to the employers in entering into the employment relation upon the basis of flat weekly wages rather than stated hourly rates. This additional purpose of the flat weekly wage will be considered on pages 11 to 13, *infra*.

concerned each of the plaintiffs was employed and paid by the defendants pursuant to the terms of that master agreement: more particularly, that each plaintiff received a flat weekly wage for a fixed workweek whose hours substantially exceeded the statutory maximum (123-6, 127-8, 147-155).

The agreement included a formula which purported to derive the regular hourly rate from the weekly wage. That formula was as follows (Ex. 1, p. 27):

> "The hourly rates for those regularly employed more than forty (40) hours per week shall be determined by dividing their weekly earnings by the number of hours employed plus one-half the number of hours actually employed in excess of forty (40) hours."

The significance of this formula is to be found in an analysis of its effect as a matter of arithmetic. We shall take an illustration of its use, employing for that purpose figures of a macrocosmic order so that the calculation may be made by mental arithmetic. Suppose an employee to be receiving $110 a week for a 50 hour workweek. Applying the formula, his hourly rate would be $110 divided by 55, or $2.00. He would then be listed as having received 40 times $2 or $80.00 for his straight time plus 10 times $3.00 or $30.00 for his overtime, making a total of $110.00.

From this illustration it is apparent that the entire formula was simply a tautology designed to validate a predetermined weekly wage. It caused the weekly wage to be divided in the very same manner and by the very same numbers by which the resultant quotient was subsequently to be multiplied in order to calculate the total weekly payment.

The arithmetical consequence of this device was that, although the hours regularly worked above 40 hours per week may have been overtime hours in theory, they never could yield any additional compensation in fact. The formula served the flat weekly wage as a self-adjusting mechanism. Its real effect was to render that wage the single and indivisible compensation for a workweek in which straight time and overtime were fused, and to render the theory of a special premium for hours regularly worked above 40 a fiction.

The self-adjusting character of the formula had its expected consequence. The defendants' payroll records establish that the formula was never actually used in order to determine the weekly wage. The columns and figures which purported to utilize the formula to derive the regular hourly rate and then to employ that derived rate in order to fix the weekly wage were simply so many instances of window dressing. The proof of that fact rests in the circumstance that, although the payroll recitals of the formula hourly rate, the derivative overtime rate and the incidental calculations were honeycombed with substantial errors of calculation, these errors were in no instance reflected in the statement of the weekly wage. That wage, having been determined antecedently and independently of any calculation which employed the formula, remained constant and "correct" however gross the errors in the use of the formula.

An examination of a few instances of the alleged use of the formula will be instructive. Let us start with Exhibit 6, payroll record 100. It there states that the plaintiff Manne received $28.90 as his total wage for the 46 hour week. The regular hourly rate

under the contract formula is stated to be .589 and the rate for overtime hours is stated to be .884. If, however, we were to use these figures as the basis for a computation of the amounts payable for straight time and for overtime respectively, the payment for straight time would be $23.56 (40 times .589) and the payment for overtime would be $5.30 (6 times .884). On that basis, Manne's total earnings for that week should have been $28.86, or 4c less than he actually did receive. The payroll record avoided that situation by the injection of two arithmetical errors, the combination of which picked up the extra 4c. It stated the total payable for straight time at $23.59 (which was 3c too much) and the total payable for overtime at $5.31 (which was 1c too much).

The situation described in the preceding paragraph was not isolated. Thus, throughout the entire period between the week ending October 16, 1943 and the week ending December 11, 1943, the overtime hourly rate which should have been given to McCole, upon the basis of his straight time hourly rate of .48, was .72. Instead, his overtime hourly rate was stated at .69 (Ex. 6, payroll records 94-103). Throughout the same period Torra, with a stated hourly rate of .6525, should have had an overtime hourly rate of .9787. Instead, his overtime hourly rate was stated at .9650 (id.).

The foregoing are simply a few among the many instances of a general pattern which is exhibited, in one form or another, on every payroll record and with respect to every plaintiff. There is not a single payroll record which is free from some error respecting either the hourly rate as computed with the formula or the derivative overtime hourly rate or the result of

the calculation which the proper use of the formula hourly rates would have produced.

The fractional character of some of the discrepancies must not divert us from the significance of their ubiquity. The full meaning of the formula will now be manifest. Its mission of enabling the employers to set in motion a chain of arithmetical operations designed to lead the calculator back to the number from which he had started was difficult of attainment in practice. That difficulty was occasioned by the fact that the hourly rate which the formula produced was invariably an infinitely repeating decimal. Unless, therefore, the defendants were prepared to maintain bookkeepers especially engaged in carrying out all these calculations to a very large number of decimal places, the cycle would never return to the original number to which it was ideally linked. The defendants realized the fundamental sterility of the entire procedure. So, knowing in advance the result which calculations carried out to an infinite number of decimal places would have produced, they forebore to trouble themselves with more than a perfunctory genuflection to the formula in practice. Having first determined the weekly wage which each employee was to receive, they then used the formula to derive a rough quotient. Then, when it became evident that the failure to carry out that rough quotient to a sufficient number of decimal places would precipitate a wrong answer, they picked up the slack by injecting the requisite quantum of corrective error either into the calculation of the overtime rate or into the multiplication of rate by hours. The whole process was perfectly analogous to the act of a schoolboy in a class in arithmetic who, having first looked at the answer in the back of the book, proceeds to "solve" the problem by simply writ-

ing down a series of numbers which are not too ostensibly irrelevant, and then draws a line and writes in the answer.

It is now possible to consider another purpose which the employers served in fixing the compensation in terms of flat weekly wages rather than at hourly rates. Just before the signing of this new contract, the National War Labor Board had announced that the rise in the cost of living since 1939 had rendered the employers' offer of a 10% increase "totally inadequate to correct the sub-standard conditions here confronting us" (Ex. 4, p. 25, lines 3-5; p. 26, last two lines to p. 27, line 2). In fact, one of the major purposes of that Directive Order had been to inaugurate a system of wage increases "justified by the rise in the cost of living since January 1, 1941" (Ex. 4, p. 3).

Accordingly, upon the signing of the new agreement, the employers had found it necessary to promise substantial wage increases (Ex. 1, p. 26).

Now if the new compensation had been expressed in terms of the hourly rates which the application of the formula to the weekly wage would have yielded, those alleged new hourly rates would have compared with the prior hourly rates of the respective plaintiffs as follows:

Plaintiff's Name	Old Hourly Rate (See calculations in Ex. 5)	New Hourly Rate (See Appendix A of Petitioners' Brief)
Del Rio	.530	.544
Manne	.530	.544
McCole	.420	.392
Peterson	.530	.544
Torra	.600	.604
J. H. Berger	.820	.769
Rodriguez (also known as Sanchez)	.620	.577

These figures tell a significant story. Of the 7 plaintiffs with whom we are here concerned, a statement of the new wage upon an hourly basis (as calculated with defendants' formula) would have revealed four to have received but insignificant increases, while the other three received substantial reductions. Thus, if the new wages had been stated in terms of the hourly rates which the application of the contract formula would have produced, it is fair to assume that the contract would never have been signed. Both the inadequacy of the pay raises to those employees who were fortunate enough to receive them and the discrimination against those employees whose rates were actually reduced would have constituted insurmountable barriers.

The expression of the new compensation in the form of a flat weekly wage enabled the employers to simulate substantial wage increases. The employees knew the amounts of the weekly wages which they had actually been receiving under the old Sloan agreement. On the other hand, they could not yet know the extent to which those prior wages had been legally inadequate. The lengthy calculations upon the basis of which they were retroactively to receive higher weekly wages for their entire employment period under the old Sloan agreement had not yet been made (64-5, Ex. 5). In the absence of information with respect to those calculations, it was inevitable that the employees should compare the new weekly wages with the weekly wages which they had actually been receiving rather than with the (then still unknown) weekly wages which they had legally been entitled to receive.

The situation may be epitomized briefly. At the time this new collective bargaining agreement was

entered into, the employees knew what their prior hourly rates had been, but did not yet know the extent to which their prior weekly earnings should have been higher. The latter calculations had not yet been made (Ex. 5). Accordingly, if the new wage had been expressed in terms of a stated hourly rate, that rate would have had to be substantially higher than the old one. But by stating the new compensation in terms of a weekly wage, it was simple to create the appearance of a substantial wage increase without actually giving it; since the coordinate of reference was the inadequate weekly wage which they had previously been receiving rather than the higher weekly wage which they had previously been entitled to receive.*

Accordingly, the employers' real object in stating the compensation upon a weekly rather than upon an hourly basis was that it enabled them to confuse the employees and seriously dilute their bargaining power.

* It was not merely the men who were misled. Thus, the National War Labor Board itself had stated that the new minimum hourly rate in lofts of this class would be "something over 59c" (Ex. 4, p. 34, the first sentence following the diagram). An examination of the new alleged hourly rates listed in Appendix A of petitioners' brief will establish the extent of that miscalculation. There can be no question but that the National War Labor Board itself was either completely confused or made the mistake of simply adopting a proffered calculation without checking it. Thus, any examination of the weekly payroll records even for the period succeeding the first wage increase will reveal that the minimum hourly rate which the application of the employers' formula would give was 56c for the regular employees and as low as 45c for the watchmen (Ex. 6).

The National War Labor Board's mistaken belief that the new contract would give the employees a substantial raise in wages was one of the reasons for its acquiescence therein (Ex. 4, p. 3, the second sentence of the second paragraph). But if the new hourly rates had been stated in the contract itself, they must necessarily have been higher; since the deception would then have been impossible.

It achieved that object in two ways. First, by causing the employees to take an extra-statutory workweek for granted, it diverted their attention from the very possibility that a 40 hour workweek might be equated with a living wage. In that manner, it frustrated the object of the Act to establish a special premium for overtime hours. Second, by inducing the employees to compare their new compensation with their old weekly wages (which had been held to be legally insufficient) rather than with their old hourly rates, it created the simulacrum of a substantial wage increase.

One final provision of the agreement must now be noted. It was expressly provided that if an employee other than a watchman worked more than 46 hours in any week or more than 9½ hours in any one day, those additional hours would be compensated at the rate of time and three-quarters the hourly rate as computed under the contract formula. For watchmen the base was 54 hours in any week and 11½ hours in any one day, and the rate for the additional hours was double time (Ex. 1, p. 29).

These provisions for additional compensation for hours worked beyond the 46 or 54 hour workweek which the contract standardized were the only provisions under which an employee could ever receive a premium above his flat weekly wage. They constituted a kind of practical construction that, under this employment relation, overtime premiums did not begin with the hours above 40 as contemplated by the Act, but with the hours above 46 or for watchmen above 54.

The Findings of the Courts Below.

The Circuit Court of Appeals unanimously approved the findings of the District Court that the plaintiffs had been employed "at fixed weekly rates of compensation" (finding of fact numbered "15"; pp. 83-4), that the contract formula "did not correctly calculate or determine the true hourly rates of their employment" (finding of fact numbered "17"; pp. 83-4), and that the plaintiffs did not receive compensation for their overtime hours "at rates equal to at least 1½ times the regular hourly rates at which they were employed" (finding of fact numbered "13"; pp. 83-4).

The Circuit Court of Appeals unanimously approved the finding of the District Court that the formula which the defendants invoked in order to derive the regular hourly rate from the fixed weekly wage "was designed to offset the full overtime costs which would ensue if hourly rates were computed in the ordinary way" (finding of fact numbered "18"; pp. 83-4). It also unanimously approved the finding that the purpose of the formula "was to reduce the hourly rate sufficiently so the payment of time and a half for overtime would not bring the total weekly earnings substantially above the weekly rates set by the agreement" (finding of fact numbered "19"; pp. 83-4).

Concerning the defendants' formula for ascertaining the hourly rate, the Circuit Court of Appeals stated (p. 84):

> "It does negate the statutory purposes to base employment upon a regular unvarying weekly wage for a workweek in excess of the statutory minimum hours and then merely break that down

> into so-called regular and overtime hourly rates by means of a formula so the weekly wage actually definitely fixed is seemingly transferred into an hourly wage rate. That amounts but to an illusion of overtime pay after a forty hour workweek where there can be no increase in pay per workweek because of overtime work unless there is overtime not only in excess of the statutory workweek but also in excess of the agreed workweek."

The Circuit Court of Appeals unanimously approved the finding of the District Court that the contract formula was not applied in situations wherein its usage would have caused the weekly wage to vary from week to week (finding of fact numbered "20"; p. 83).

We may here refer to petitioners' misinterpretation of a parenthetical utterance of the District Court set forth at folio 200 (petitioners' brief, p. 3, ll. 6-8). Petitioners' counsel would have that statement construed as a finding that the formula had been uniformly used in arriving at the weekly wage (id.). But this portion of the opinion must be read both in the light of finding numbered "20" (172-3) and in the light of the uncontradicted evidence of the defendants' own payroll records. The only reasonable interpretation of this portion of the opinion is that the District Court was referring to certain instances in which the defendants had used the formula in order to calculate hourly rate upon making adjustments for excusable or inexcusable absenses (141-6). Respecting such irregular and occasional uses of the formula, the District Court was stating the principle that an incorrect method of deriving the hourly rate from the weekly wage could not acquire validation simply from the fact that it may in certain instances

have been used (200). It will be noted in this connection that the Circuit Court unanimously adopted the finding that the formula rate was not adhered to so far as concerned the determination of the weekly wage (p. 83).

POINT I.

The principle of the decisions rendered below has been settled by this Court. There are no reported decisions to the contrary.

We have set forth the evidence in somewhat great detail in order to show that this was no inadvertent failure to pay the overtime premium required by the Act, but a deliberate attempt to continue a prior practice which avoided it. Nevertheless, the unanimously approved findings of fact, each adequately and amply supported, permit a very simple formulation of the determinative principle.

The question may be presented as follows:

May an employer pay his employees a flat weekly wage for workweeks which regularly include hours substantially longer than the maximum permitted by the Fair Labor Standards Act, and then, in order "to offset the full overtime costs which would ensue if hourly rates were computed in the ordinary way", bind his employees by a formula for calculating the hourly rate which violates the *Missel* principle and the effect of which is to relieve him from any additional payments for the regularly worked overtime hours?

We submit that a negative answer to this question directly follows from and is required by all the relevant decisions of this Court and of the several Circuit Courts of Appeals. There is no contrary view.

The decisions of the Courts below directly follow the decisions of this Court in *Walling* v. *Hardwood Co.*, 325 U. S. 419, *Walling* v. *Helmerich & Payne*, 323 U. S. 37, and *Walling* v. *Harnischfeger Corp.*, 325 U. S. 427. The determinative principle was stated by this Court in the *Hardwood* case as follows (325 U. S. 419, 425):

> "Once the parties have decided upon the amount of wages and the mode of payment the determination of the regular rate becomes a matter of mathematical computation, the result of which is unaffected by any designation of a contrary 'regular rate' in the wage contracts."

The attention of this Court is now directed to the decision in *Watkins* v. *Hudson Coal Co.* (C. C. A., 3rd Cir.), 151 Fed. (2nd) 311, cert. den. 66 S. Ct. 522. The *Watkins* case appears to us to be identical with the case here presented. We have the very identical formula for deriving an alleged hourly rate from the weekly wage (sponsored, incidentally, by the same attorneys by whom this formula has been sponsored). We also have the same attempt to use the formula to the end of indirectly inducing the employees to accept a compensation which they might otherwise have refused. The following extract from the opinion of that Circuit Court has, therefore, a peculiar relevance here:

> "For a formula to be productive of a regular rate and overtime rate such as will meet the requirements of the Act, it must not be a mere mathematical cloak under which to continue the same payment practices as hitherto. The rate established as the regular rate, in order to be adjudged actual and not fictitious must either

(1) bear a real relation to actual earnings as deduced by the *Missel* case principle or (2) it must be a genuine contractual decrease in wages, based upon bargaining, individual or collective. Under such a test of the requirements of the Act, the formulae of the instant case clearly fail. The evidence already marshalled is clearly indicative that the formulae were directed only to one goal, *i. e.*, to continue the old methods of payment for work while ostensibly meeting the requirements of the Act technically and technicalities are not enough." *Watkins* v. *Hudson Coal Co.* (C. C. A., 3rd Cir.), 151 Fed. (2nd) 311, 319, cert. den. 66 S. Ct. 522.

We know of no decisions which are contrary, or upon the basis of which the decisions of the lower courts could be reversed. Each of the decisions to which petitioners' brief refers to support the claim that there is a contrary view involves a case in which there had been an express finding by the trial court that the rate of compensation had originally been fixed at a stated sum per hour. *Bergschneider* v. *Peabody Coal Co.*, 142 Fed. (2nd) 784; *Shepler* v. *Crucible Fuel Co.*, 140 Fed. (2nd) 371; and *Walling* v. *Halliburton Oil Well Cementing Co.*, 152 Fed. (2nd) 622. Accordingly, each of those decisions is distinguished from the instant one by the circumstance that the finding of this District Court, adequately supported and unanimously approved, was that the employment in this case had been "at fixed weekly rates of compensation" (finding of fact numbered "15"; pp. 83-4).

POINT II.

Review by this Court could serve no useful purpose.

Petitioners' counsel argues that a review by this Court would save much needless litigation. However, the contrary is demonstrable. The Courts below have determined that, where the basis of the employees' compensation has been set at a flat weekly wage for a workweek which regularly included many overtime hours, the employers' statutory obligation to pay additional compensation for the overtime hours may not be circumvented by an artificial manner of calculating the regular hourly rate. It is inconceivable that this Court would hold otherwise. Accordingly, the only effect of granting a writ of certiorari would be to create a period of uncertainty which the actual certainty of the result could not justify.

POINT III.

The application for a writ of certiorari should be denied.

Dated, New York, October 9, 1946.

Respectfully submitted,

WILBUR DUBERSTEIN,
FREDERICK E. WEINBERG,
Counsel for Respondents.

COPY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 497.

149 MADISON AVENUE CORP. and WILLIAMS & CO., INC.,
Petitioners,

v.

FRANK ASSELTA, CAMILO DEL RIO, JOSEPH McARDLE, SAMUEL MANNE, CORNELIUS McCOLE, BURTON PETERSON, FRANK RODRIGUEZ, JAMES TORRA, JOHN H. BERGER and GEORGE BERGER,
Respondents.

BRIEF FOR RESPONDENTS.

WILBUR DUBERSTEIN,
FREDERICK E. WEINBERG,
Counsel for Respondents.

THE COURT PRESS, N. Y. C.

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Respondents.

BRIEF FOR RESPONDENTS.

Statement.

This cause comes before this Court on writ of certiorari granted on December 9, 1946. The judgment of the Circuit Court of Appeals, Second Circuit, was entered upon a decision which unanimously affirmed a judgment entered in the District Court, Southern District of New York, after trial before the Honorable William Bondy, *J.*, without a jury.

The Question Presented.

This is an action to recover additional compensation, liquidated damages and attorneys' fees due under 29 U. S. C. A., Sections 207, 216(b) also known as the Fair

Labor Standards Act of 1938.* The plaintiffs-respondents were employed by the defendants-petitioners as maintenance employees of a loft building in New York City. Coverage under the Act has been expressly conceded (R. 74).

The sole question in this Court is whether the compensation paid to these plaintiffs for such hours as they worked beyond 40 of each week constituted compliance with the defendants' obligation to pay the plaintiffs therefor "at a rate not less than one and one-half times the regular rate" of employment: 29 U. S. C. A., Section 207(a).**

The Facts.

A. The Events Which Led Up to the New Employment Agreement.

The employment period with which we are here concerned began on April 20, 1942 (R. 54-61). For a proper understanding of the method of compensation which then prevailed, however, it will be necessary to briefly consider the method of compensation which had preceded it.

Throughout the period between April 24, 1939 and April 20, 1942 the plaintiffs had been employed under the terms of a collective bargaining agreement known as the Sloan Agreement (Ex. 3). The parties to that agreement had been the Realty Advisory Board on Labor Relations, Inc. of which the defendants were members and

* The relevant sections of the Act are set forth at length in the Appendix on pp. 29-30.

** This action, now continued as to only 7 plaintiffs, originally included claims for liquidated damages arising out of a prior employment period. The answer of the defendants had questioned coverage and interposed alleged general releases. After the decision in the plaintiffs' favor in the District Court these amounts were finally paid under a stipulation pursuant to which the claims with which we are now concerned were severed (R. 72-5).

Local 32-B of the Building Service Employees International Union of which the plaintiffs were members (id.). The outstanding characteristic of that agreement was that each plaintiff had been employed upon a fixed work-week of either 48 or 47 hours (in the case of the night watchmen of 60 hours) and had received his compensation in the form of a fixed weekly wage (Ex. 3; R. 42, 44).

The Sloan Agreement was to expire by its terms on April 20, 1942 (Ex. 3). During the months of December of 1941 and January of 1942, however, the Circuit Courts of Appeals in the Third and Fourth Circuits handed down two decisions in favor of employees the effect of which would be to render the payment practices under the Sloan Agreement illegal. The decision which was subsequently to be affirmed by this Court under the title of *Kirschbaum* v. *Walling*, 316 U. S. 517, held that the employment of maintenance employees in buildings of which substantial portions were occupied by tenants in the production of goods for interstate commerce fell within the purview of the Fair Labor Standards Act. And the decision which was subsequently to be affirmed by this Court under the title of *Overnight Motor Transportation Co.* v. *Missel*, 316 U. S. 572, held that, where the compensation in an affected employment is upon a weekly basis, the regular hourly rate for the calculation of the additional compensation for overtime is the quotient of the weekly wage divided by the number of hours worked during the week.

Accordingly, with the decisions in the *Kirschbaum* and *Missel* cases in the Circuit Courts in front of them, and anticipating their affirmance by this Court, the employers set about to devise a plan through which the payment practices under the old Sloan Agreement might be continued. The expressed purpose of that plan was to standardize a 54 hour week for watchmen and a 46 hour

week for the other employees through the incorporation into the new collective bargaining agreements of "special formulae for computing hourly rates and overtime" required by the "prospective application to loft buildings of the Fair Labor Standards Act" (Ex. 4, p. 70, first paragraph).

The plan devised involved the use of a special formula calculated to cause a fixed weekly wage for an extra-statutory workweek to simulate compensation based upon an hourly rate. The formula was first inserted in the new closed shop agreement (Meyer Agreement). After this Court's affirmance of the *Kirschbaum* and *Missel* decisions, the same formula was inserted in the new open shop agreement with which we are directly concerned in this litigation (Ex. 4, p. 70).

Before examining the new contract formula, a few words may be said about the position of the National War Labor Board. That position is set forth quite clearly in the NWLB Directive Order (Ex. 4, p. 70). As there stated, the new formula had already been inserted in the new closed shop agreement (Meyer Agreement). By reason of that prior adoption before the NWLB had even come upon the scene, the Board's principal aim was to cause the formula to be inserted in the new open shop agreement upon the ground that it had "already been accepted in principle by the parties" (Ex. 4, p. 34, ll. 6-8).*

B. The Employment Period after April 20, 1942 (the Period Covered by This Suit).

The Sloan Agreement expired April 20, 1942 (Ex. 3). The new collective bargaining agreement was executed on September 1, 1942, but included a provision under which

* We shall see hereafter that the Board itself misapprehended the effect of the new formula, and believed that it would substantially increase the employees' minimum hourly rates (see pp. 12-13, *infra*).

an attempt was made to render it retroactive to April 21, 1942 (Ex. 1, p. 12). Our statement at this point will be confined to a consideration of the new collective bargaining agreement as such. The attempted retroactive feature will be considered separately hereafter.

The parties to the new agreement were the Realty Advisory Board on Labor Relations, Inc. which represented the employers including these defendants and Local 32-B of the Building Service Employees International Union representing the employees including these plaintiffs (Ex. 1).

The cover of the agreement bore the legend in capital letters "National War Labor Board Agreement" (Ex. 1). As we have seen, however, the National War Labor Board was not a party thereto.

The agreement fixed the workweeks for employees other than watchmen at 46 hours per week and for watchmen at 54 hours per week (Ex. 1, pp. 27, 28). It also fixed minimum weekly wages whose exact amounts were determined by the area of the affected building (id., p. 25).

By stipulation entered into upon the trial (and amended in certain immaterial respects while the appeal was pending in the Circuit Court of Appeals), each of the plaintiffs was employed by the defendants pursuant to the terms of that master agreement. More specifically, each of the plaintiffs received a fixed weekly wage for a workweek whose hours were set at a constant figure which was substantially longer than the statutory maximum workweek (R. 41-3, 49-52).

If this new agreement had contained nothing further with respect to the manner of compensation, its terms would have been indistinguishable from the flat weekly wage for a fixed extra-statutory workweek which had rendered the Sloan Agreement illegal. An attempt was now made, however, to create a basis for differentiation. That method involved a formula which must now be examined.

The formula was as follows (Ex. 1, p. 27):

> "The hourly rates for those regularly employed more than forty (40) hours per week shall be determined by dividing their weekly earnings by the number of hours employed plus one-half of the number of hours actually employed in excess of forty (40) hours."

The significance of this formula is to be found in an analysis of its effect as a matter of arithmetic. We may illustrate its use by reference to the position of the typical employee whose workweek was fixed at 46 hours. Using the Mis-el formula, the regular hourly rate of his employment would be the quotient of the weekly wage divided by 46. Under this new device, however, the alleged regular hourly rate would be the quotient of the weekly wage divided by 46 plus ½ of 6—that is, the quotient of the weekly wage divided by 49. The selection of 49 as the divisor was in anticipation of the number by which the quotient would subsequently have to be multiplied in order to determine the weekly earnings. For the effect of the Act was that an employee working on a 46 hour week would be entitled to receive 49 times his regular hourly rate (the arithmetical equivalent of 40 times the regular hourly rate plus 6 times the overtime rate of time and one-half).

Thus, the entire process was simply a tautology. By causing the weekly wage to be divided by the very same number by which the resultant quotient was subsequently to be multiplied in order to determine the weekly wage, the calculator was always assured of returning to the same number from which he had started.

In order that the tautological function of the formula may be still clearer, we may work out a complete example of its use. We shall choose for this purpose figures of

macrocosmic proportions so that the calculations may easily be made by mental arithmetic. Suppose an employee to be receiving $110 a week for a 50 hour workweek. Applying the formula, his hourly rate would be $110 divided by 55, or $2. He would then be listed as having received 40 times $2 or $80 for his straight time plus 10 times $3 or $30 for his overtime, making a total of $110.

This formula was the first step in the scheme designed to cause a flat weekly wage for a fixed extra-statutory workweek to simulate a compensation under which straight time and overtime had been the subject of different rates. The purpose of that scheme was to show that the flat weekly wage—any flat weekly wage—might have been built up upon the basis of the differential rates required by the Act and that, since it might have been so derived, it should be treated as though it had been.

Once the formula had been used in order to show that a figure really did exist from which the weekly wage might have been derived, it remained only to invoke proper supporting devices in order to give to the precipitate of the formula a verisimilitude. In other words, the employers now took what they believed to be adequate precautions to cause the result of their mathematical formula to simulate the basis of the weekly compensation. We must now consider what those efforts were.

The principal device utilized by the defendants to cause it to appear that the weekly wages had been compounded of separate straight time and overtime hourly rates rested in the form of their weekly payroll records. A comparison of that form with the one which had been used prior to the date of the signing of the new agreement will show that the old form had been expanded by the addition of certain new columns. These new columns purported to state for each employee: the number of hours which con-

stituted his "regular time", his hourly rate therefor, the number of hours which constituted his "overtime", his hourly rate therefor, and his total weekly pay (Ex. 6). A cursory inspection of these columns would give the impression that the employee's earnings had been based upon an underlying hourly rate, that the compensation for "regular time" was the product of that hourly rate by the number of hours up to 40, that for each additional hour he received an "overtime" hourly rate which was 1½ times the "regular time" hourly rate, that his compensation for such overtime hours was the product of such hours and the overtime rate, and that the "total pay" listed in the right hand column represented the sum of his "regular time" and "overtime" pay respectively (Ex. 6). Each of these weekly payroll records was then signed by the affected employees upon the receipt of their weekly wages (id.).

If we look beneath the columnar headings, we shall find that these payroll records contain an important message. A few illustrations will make that message clear.

Let us start with Exhibit 6, payroll record 100. It there states that the plaintiff Manne received $28.90 as his total wage for the 46 hour week. The regular hourly rate under the contract formula is stated to be .589 and the rate for overtime hours is stated to be .884. If, however, we were to use these figures as the basis for a computation of the amounts payable for straight time and for overtime respectively, the payment for straight time would be $23.56 (40 times .589) and the payment for overtime would be $5.30 (6 times .884). On that basis, Manne's total earnings for that week should have been $28.86, or 4¢ less than he actually did receive. The payroll record avoided that situation by the injection of two arithmetical errors, the combination of which picked up the extra 4¢. It stated the total payable for straight time at $23.59

(which was 3¢ too much) and the total payable for overtime at $5.31 (which was 1¢ too much)..

The situation described in the preceding paragraph was typical. Thus, throughout the entire period between the week ending October 16, 1943 and the week ending December 11, 1943, the formula overtime hourly rate which should have been given to McCole, upon the basis of his formula straight time hourly rate of .48, was .72. Instead, his overtime hourly rate was stated at .69 (Ex. 6, payroll records 94-103). Throughout the same period Torra, with a stated formula hourly rate of .6525, should have had a formula overtime hourly rate of .9787. Instead, his overtime hourly rate was stated at .9650 (id.).

The foregoing are simply a few among the many instances of a general pattern which is exhibited, in one form or another, on every payroll. There is not a single payroll record which is free from some error respecting either the hourly rate as computed with the formula or the derivative overtime hourly rate or the result of the calculation which the proper use of the formula hourly rates would have produced.

The true meaning of formula and payroll records will now be clear. While the discrepancies involved are fractional, we cannot miss the significance of their ubiquity. They are not simply errors of calculation chargeable to the ministerial employees to whom the task of calculation had been entrusted. They point clearly to the fact that the defendants themselves were uniformly cynical with respect to any meaning or value from the use of a formula in a situation in which the weekly wage for the fixed workweek had been independently determined. Atrophy of form flowed inevitably from absence of function.

In view of the importance which the defendants have always attributed to the form of these payroll records, a final word may be said with respect to the only interpretation which their content renders tenable.

The function of the formula to enable the employers to set in motion a chain of arithmetical operations designed to lead the calculator back to the number from which he had started was difficult of attainment in practice. That difficulty was occasioned by the fact that the hourly rate which the formula produced was invariably an infinitely repeating decimal (Ex. 6). Unless, therefore, the defendants were prepared to maintain bookkeepers especially engaged in carrying out all these calculations to a very large number of decimal places, the cycle would never return to the original number to which it was ideally linked. The defendants realized the fundamental sterility of the entire procedure. So, knowing in advance the result which calculations carried out to an infinite number of decimal places would have produced, they forebore to trouble themselves with more than a perfunctory genuflection to the formula in practice. Having first determined the weekly wage which each employee was to receive, they then used the formula to derive a rough quotient. Then, when it became evident that the failure to carry out that rough quotient to a sufficient number of decimal places would precipitate a wrong answer, they simply picked up the slack by injecting the requisite quantum of corrective error either into the calculation of the overtime rate or into the multiplication of rate by hours. The whole process was perfectly analogous to the act of a schoolboy in a class in arithmetic who, having first looked at the answer in the back of the book, proceeds to "solve" the problem by simply writing down a series of numbers which are not too ostensibly irrelevant, and then draws a line and writes in the answer.

The weekly payroll records themselves conclusively negative the possibility that these weekly wages had been compounded from regular and overtime hourly rates applied to bracketed categories of hours.

The payroll records represented defendants' sole attempt to establish that the weekly wages of these plaintiffs had been built up from differential rates applied to regular time and overtime as required by the Act. An additional attempt was made, however, to gain recognition for the quotient of the formula as the true hourly rate. That attempt was predicated upon the fact that, in those instances in which an employee's weekly wage was adjusted by reason of excusable or inexcusable absences, such adjustments were based upon the use of the "hourly rate" derivative from the application of the contract formula to the weekly wage (R. 47-9).

C. The Improbability That Anyone, Save the Payroll Clerks, Ever Knew What the Formula Quotients Actually Were.

During the summer of 1942, the defendants calculated the hourly rates of the plaintiffs under the old Sloan Agreement, using the *Missel* formula (Ex. 5). A tabular comparison of those hourly rates with the quotients derivative from the application of the new formula to the new weekly wages would exhibit the following relations:

Plaintiff's Name	Old Hourly Rate (See Calculations in Ex. 5)	Rate Derivative from the Application of the Formula to the New Weekly Wage (See Appendix A of Petitioners' Brief)	Relation of New Formula Quotient to Old Hourly Rate
Del Rio	.530	.544	+ .014
Manne	.530	.544	+ .014
McCole	.420	.392	— .028
Peterson	.530	.544	+ .014
Torra	.600	.604	+ .004
J. H. Berger	.820	.769	— .051
Rodriguez (also known as Sanchez)	.620	.577	— .043

These figures tell a significant story. For the 7 plaintiffs with whom we are concerned on this appeal, an hourly rate determined by the formula quotient would have had the following results: 3 plaintiffs would have received hourly increases of less than 2%, 1 an hourly increase of less than 1%, and 3 hourly decreases of approximately 7%.*

Accordingly, a comparison of the old hourly rates with the quotients derived from the application of the formula to the new weekly wages establishes the improbability that the formula quotients would ever have been accepted as the bases of the wage bargain. They would have been rejected by the employees not only by reason of their discriminatory character, but for the further reason that they wholly failed to give the kind of "wage increases" which the National War Labor Board itself had recommended (Ex. 4, p. 3). Even the employers would probably have forborne the attempt to fix rates which, as to at least 3 of their employees, would have violated the express contractual provision prohibiting any reduction of an employee's hourly rate (Ex. 1, p. 6). And it is improbable that the National War Labor Board would have countenanced it, had it known: since that Board had recommended uniform wage increases to meet the rise in the cost of living and had declared its belief that the employers' offer of a 10% increase was "totally inadequate" (Ex. 4, pp. 3, 26-7).

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* These relationships were masked by stating the compensation in the form of fixed weekly wages. For the men did not yet know the extent to which their weekly wages under the old Sloan Agreement had been insufficient under the Act. On the date when the new agreement became effective, defendants' attempt to settle their obligations under the old Sloan Agreement had not yet been made (R. 65). Thus, one effect of stating the new wage in the form of a flat weekly amount was to cause each man to compare it, simply, with the old insufficient wage which he had actually been receiving and thus to believe that the new wage represented a substantial increase.

Additional corroboration of the fact that no one—neither employee nor employer nor the National War Labor Board—was thinking in terms of hourly rates as fixed by the formula quotients rests in the manner in which the later wage increases were expressed. In each instance, the increase was calculated and expressed as an increase to the weekly wage. Thus, the September 5, 1942 increase was described as an increase of $2.50 per week and the October 29, 1943 increase was described as an increase of $1.40 per week (Ex. 6, payroll records 35 and 97).

One final aspect of this situation must now be noted, since it represents the clearest indication which we have of the National War Labor Board's real feeling about the formula.

The Board had stated that the new minimum hourly rate which would prevail under this agreement in loft buildings of this class would be "something over 59¢" (Ex. 4, p. 34, the first sentence following the diagram). Now if the hourly rates were to be calculated by the application of the defendants' formula to the weekly wage, that would be untrue (Ex. 6). If, however, we take the new minimum weekly wage of $27.50 and calculate the hourly rate by dividing that wage by the number of hours regularly worked (46), our answer will, in fact, be 59¢.

Thus (and whatever the National War Labor Board may elsewhere have said in lip service to a formula which had been adopted before it had even come upon the scene), it is clear that the Board itself was actually thinking in terms of the only arithmetically sound way of deriving hourly rate from weekly wage—the Missel formula.

D. The Employers' Practical Construction of the Point at Which Overtime Compensation Began.

The agreement provided that, if an employee other than a watchman worked more than 46 hours in any week, the additional hours would be compensated at the rate of time and three-quarters the hourly rate as computed under the contract formula. For watchmen the base was 54 hours and the rate for the additional hours was double time (Ex. 1, p. 29).

In Appendix B of the National War Labor Board Directive Order, the following explanation of this provision is given (Ex. 4, p. 70):

> "Overtime over forty-six (46) hours is paid at a rate of time and three-quarters in an effort approximately to equal the overtime to which an employee would ordinarily be entitled, if it were computed on the basis of time and a half after a forty-six (46) hour week."

The employers thus recorded their own belief that the use of the formula quotient as an hourly rate would withhold from the employees the compensation to which they would "ordinarily be entitled" if overtime were to be computed on the basis of time and a half. They took steps to see to it that the employees would receive an approximate equivalent of the overtime compensation of which the inadequacy of the formula quotient had deprived them. But their concern and the steps taken to remedy the condition occasioned by the inadequacy of the formula quotient were confined to the hours above 46. In the exclusiveness of that concern and in their disregard of what must have been recognized as the parallel inadequacy of the formula quotient with respect to the hours between 40 and 46, we have a practical construc-

tion of the point at which ordinary overtime compensation was intended to begin. That point was with the hours above 46, not with the hours above 40.

It might perhaps be suggested that a special premium for hours above 46 is consistent with overtime compensation also for the hours between 40 and 46: that it is possible to construe the special solicitude for the hours above 46 as representing an effort to give a special premium beyond and in addition to the ordinary overtime compensation. But while such a construction might be the proper one with respect to superficially similar provisions in other contracts, it is negatived by the express language of this one. The present provision establishes that the steps taken with respect to hours above 46 were not taken for the purpose of conferring a special premium. They were taken instead for the sole purpose of giving the employees that compensation for overtime to which they would "ordinarily be entitled if it were computed on the basis of time and a half."

Thus, this provision establishes at once both the defendants' recognition of the inadequacy of the formula quotient as the basis for the calculation of ordinary overtime compensation and their own intention that overtime compensation was to begin only with the hours in excess of 46.

E. From April 20, 1942 to September 1, 1942: the Retroactive Period.

From the expiration of the Sloan Agreement on April 20, 1942 until the signing of the new agreement on September 1, 1942 there had intervened a period of about 20 weeks. The payroll records throughout that period lacked even the simulation of a statement of hourly rate. The formula fig leaf was attached later (Ex. 6, payroll records 13-34).

After the signing of the new agreement, however, each plaintiff was given an additional lump sum which purported to be a bonus calculated at the rate of $2.50 per week for each week that he had worked during the period which had succeeded the expiration of the Sloan Agreement (id., payroll record 35).

It is Petitioners' present position that "all work performed from April 21, 1942 to September 5, 1942 was performed in anticipation of and subject to the new wages of which the hourly rates were an integral part", and that, upon the employee's acceptance of that lump sum, he must be deemed to have received proper compensation for such past overtime hours in accordance with the Act (Petitioners' Brief, p. 10, ll. 1-4).

Let us, for the purpose of our present consideration, assume that the compensation plan effectuated by the new agreement had constituted a proper compliance with the purpose of the Act to load the cost of all employment in excess of 40 hours per week. Petitioners have still failed to explain just how a system of lump sum retroactive payments could have operated *nunc pro tunc* to fulfill the purpose of the Act to limit the number of overtime hours demanded by employers who were not—contemporaneously—bound to pay time and one-half for overtime.

F. The Aftermath.*

This action was tried in the District Court during the latter part of November, 1944 (R. 2). The decision was handed down on December 31, 1945 (R. 68).

The agreement having expired by its terms on April 20, 1945 (Ex. 1), negotiations were commenced looking forward to the execution of a new agreement. The new agreement, executed between the Realty Advisory Board on Labor Relations, Inc. and Local 32-B of the Building Service Employees International Union, was signed on December 4, 1945 and is known as the Frankenthaler Agreement.

The Frankenthaler Agreement, in many respects identical with the agreement with which we are here concerned, contains an important difference. By the terms of the Frankenthaler Agreement, all employees other than watchmen receive fixed minimum weekly wages for workweeks which are set at 40 hours. It is further provided that their hourly rates shall be computed by dividing their weekly wages by 40.

The Frankenthaler Agreement has not, however, completely discarded the device here considered. It continues the old plan with respect to the night watchmen. On the 11th day of December, 1946, two days after this Court had granted the writ of certiorari, the Realty Advisory Board on Labor Relations, Inc. issued a circular to its members advising them to defer any change in

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* In *Burns Baking Co.* v. *Bryan*, 264 U. S. 504, 533, Justice Brandeis stated: "Much evidence referred to by me is not in the record. Nor could it have been included. It is the history of the experience gained under similar legislation, and the results of scientific experiments made, since the entry of the judgment below. Of such events in our history, whether occurring before or after the enactment of the statute or of the entry of the judgment, the court should acquire knowledge, and must, in my opinion, take judicial notice whenever required to perform the delicate judicial task here involved."

the payment practices affecting the night watchmen until after the final decision in this Court.

The Decision and Findings of the District Court.

The District Court found that the employment of the plaintiffs had been "at fixed weekly rates of compensation" (R. 57, Finding of Fact "15"). It found that the contract formula "did not correctly calculate or determine the true hourly rates of their employment" (id., Finding of Fact "17"). It found that the contract formula "was designed to offset the full overtime costs which would ensue if hourly rates were computed in the ordinary way" (id., Finding of Fact "18"). It found that the purpose of the formula "was to reduce the hourly rate sufficiently so the payment of time and a half for overtime would not bring the total weekly earnings substantially above the weekly rates set by the agreement" (id., Finding of Fact "19"). It found, finally, that the plaintiffs did not receive compensation for their overtime hours "at rates equal to at least 1½ times the regular hourly rates at which they were employed" (R. 56, Finding of Fact "13").

We must now consider a portion of the opinion of the District Court with respect to which certain statements in Petitioners' brief might otherwise convey a wrong impression. The opinion of the District Court contained the statement: "The fact that defendants here actually applied in all situations the hourly rates so derived does not validate such rates. The manner in which the hourly rate is determined and not the application of an hourly rate is the test" (R. 67).

This excerpt from the opinion of the District Court must be read in conjunction with the express finding that

the weekly payments did not conform to what they would have been if the formula had been "strictly followed" (R. 58, Finding of fact "20"). It must also be read in the light of its immediate context. Therein the District Court was simply disposing of the defendants' contention that the use of the formula quotient to make adjustments of the fixed weekly wages in the presence of absences, etc. must elevate the figure thus selected into the regular hourly rate of the employment. The rationale of the District Court's rejection of that argument had been stated just before the utterance referred to (R. 66-7). The Court stated that, once it had been found that the compensation had been fixed upon a weekly basis, "the determination of the regular rate became 'a matter of mathematical computation, the result of which is unaffected by any designation of a contrary regular rate in the wage contracts.' *Walling* v. *Hardwood Co.*, 325 U. S. 419, 425" (R. 66).

In other words, the District Court's statement that the formula quotients had been used was made *arguendo* and solely for the purpose of disposing of defendants' argument that such use could consecrate the formula quotient into the true regular hourly rate of the employment. The assumption having thus been made, defendants' argument was met by the statement, in substance, that, once the regular hourly rate of employment on a weekly wage basis had actually been determined, the mere fact that the employers used a different figure in making their adjustments of the weekly wage could not have the effect of elevating the figure so chosen into the regular hourly rate of the employment.

The Decision of the Circuit Court of Appeals.

The decision of affirmance of the Circuit Court of Appeals was unanimous and its opinion was *per curiam* (R. 81-4).

The nucleus of the opinion was as follows (R. 84):

> "It does negate the statutory purposes to base employment upon a regular unvarying weekly wage for a workweek in excess of the statutory minimum hours and then merely break that down into so-called regular and overtime hourly rates by means of a formula so the weekly wage actually definitely fixed is seemingly transferred into an hourly wage rate. That amounts but to an illusion of overtime pay after a forty hour workweek where there can be no increase in pay per workweek because of overtime work unless there is overtime not only in excess of the statutory workweek but also in excess of the agreed workweek."

ARGUMENT.

I.

The employers of elevator operatives and general maintenance employees of buildings in the New York City area have long followed the practice of equating a fixed weekly wage with a fixed workweek. The lengths of those workweeks were always far in excess of 40 hours per week.

The 1942 judicial determinations that the Fair Labor Standards Act was applicable to this employment threatened these employers with a substantial rise in labor costs. For by the terms of that Act they were now obligated to pay for all working hours in excess of 40 in each week at the rate of 1½ times the regular hourly rates of employment.

In this situation the employers invented a scheme through which they hoped to be able to continue to hire their employees for workweeks substantially longer than the statutory maximum while avoiding the increased labor costs which the Act would require. The new invention consisted in continuing to employ the men upon the basis of a flat weekly wage for workweeks fixed at hours substantially in excess of the statutory maximum, but to include a formula through which the flat weekly wage would appear to have been derived as the end-result of the application of straight time and overtime rates to the separate categories of hours.

The flaw in the employers' plan rested in the circumstance that, while a flat weekly wage for an extra-statutory workweek can always, by arithmetical ingenuity, be expressed in such a form as to cause it to appear to have been a composite of earnings based upon different hourly rates, that is not the equivalent of a wage which had been so derived in fact. The true test is not how the weekly earnings can be expressed, but how, in fact, they had been determined. By that test, a weekly wage which truly represented the total of straight time and overtime compensation properly computed would be in compliance with the Act; whereas a weekly wage which was simply a flat payment for an extra-statutory workweek would be illegal.*

There is reason to believe that the employers them-

* The failure to understand this distinction has given rise to the "dilemma argument" of counsel for the *amicus curiae* (Brief, p. 19, first paragraph). Of course, the mere fact that an employee's compensation has been expressed as a weekly wage does not exclude the possibility of its having been the genuine aggregate of straight time and overtime compensation properly computed. A weekly wage which had actually been so derived would be in compliance with the Act. But the defect of the wages with which we are here concerned is that they had not been so derived, and that the formula through which such a derivation was attempted to be simulated was a hoax.

selves were keenly aware of this difference between appearance and reality. Great efforts were made to cause it to appear that the weekly compensation was not a flat wage for a fixed extra-statutory workweek, but that it actually represented the weekly earnings which had resulted from the application of straight time and overtime rates to the hours worked. These efforts at dissimulation may now briefly be reviewed.

As each employee received his weekly wage, he was directed to sign his name on a payroll record which was splashed with figures purporting to show how the weekly wage had been derived from regular time and overtime hourly rates. And, whenever the presence of excusable or inexcusable absences indicated that the fixed weekly wage should be adjusted, the adjustment was made upon the basis of the hourly rate fabricated by the formula rather than at the rate which would have resulted from dividing the fixed weekly wage by the number of hours worked. It was thus hoped that the improper calculation of the regular hourly rate of the employment in one or more instances might sanction the use of the same improper method when it became necessary to ascertain whether the employee had received proper overtime compensation.

But the mask was threadbare. The weekly payroll records upon which so much reliance was placed were themselves the most unerring indications of what had been done. And the amounts of the alleged "hourly rates" which the formula precipitated negatived the possibility that anyone, save only the payroll clerks, could ever have known what they were. Finally, in the circumstance that the employers themselves recognized that the formula quotients could not yield overtime compensation for the hours which exceeded 46 (unless multiplied by 1¾), we have the clearest indication of the employers' own construction of the point at which overtime compen-

sation began—that is, with the hours above 46 instead of with the hours above 40.

All in all, there was not a single contract provision, payroll entry, calculation or payment which does not point to the fact that the compensation was simply a fixed weekly wage for an extra-statutory workweek, and that the formula and its derivative quotient was simply a subterfuge. The skin may have been the skin of an hourly rate, but the voice was the voice of a fixed weekly wage.

Petitioners claim that the method of payment used was the only one which was practicable. This argument is associated with a reference to the thousands of employees involved, stated in such a manner as to imply that there were as many different wage levels as there were employees.

In the first place, an examination of the contract reveals that, however large the total number of affected employees, there were only 12 different wage categories (Ex. 1, p. 25). Accordingly, it would have been as easy to express each one of these wage levels in terms of hourly rate as of weekly wage.

The learned counsel for the *amicus curiae* suggest that some of the employees other than those here involved had previously been classified in terms of differing weekly wage levels, and that it would have been impracticable to reclassify them in terms of their appropriate hourly rates (Brief for Midtown Realty Owners' Association, Inc., *Amicus Curiae*, pp. 16-17, footnote).

It will be necessary to examine some preliminary matters in order to ascertain the true dimensions of the situations referred to. Thus, it will be noted that not one of the employees here suing as plaintiff came within any of these allegedly exceptional categories. Moreover, the con-

tract itself in no instance purported to state the compensation payable to any employee affected by a special wage "differential" (Ex. 1, p. 25).

The only conceivable application of counsels' argument would be to the employers' treatment of certain of their employees other than those here plaintiff. So limited, the argument would be that the prior statuses of such employees, as not falling within any of the payment categories of the main body of the employees, rendered it more significant to state their compensation in the form of a weekly wage, which was in accord with their previous manner of payment, than with an hourly rate which would have been a departure therefrom.

Once the limited distribution of the employees falling within these special categories be recognized, the inadequacy of counsels' argument is apparent. A contract which did not purport to state the compensation payable to any such employees and payroll records which were not concerned with any such employees both showed that the compensation of all the employees had been fixed in terms of weekly wages. So that, even if these employees of special status had really required compensation in the form of weekly wages rather than hourly rates, it would be unreasonable to seek explanation of the uniform treatment of the many in the special requirements of the few.

Beyond everything else, however, it is difficult to understand why even the employees who were on differential weekly rates could not with equal convenience have been placed on differential hourly rates. Counsels' constant coupling of the weekly wage basis with such phrases as "less abnormal" and "less unwieldy" contains a glibness which a close examination of the facts will dissolve. It was not hourly rates as such which would have been unintelligible, but those misshapen formula quotients which the employers' camouflage necessitated. Relieved of the

necessity of the mathematical masquerade, it would have been very easy for the employers to have placed their employees upon stated hourly rates and then simultaneously have informed any of those who were interested as to the amounts of their derivative (in that event, truly derivative) weekly wages. For the distinctive aspect in the picture presented by all these employees was that they were on workweeks of constant length. Thus, there was no principle of income stabilization which could have served to render the weekly wage preferable to the hourly rate basis. Compensation calculated upon the basis of hourly rates would, the workweeks being constant, have yielded constant weekly wages, too.

A final word may be said upon this whole argument of impracticability. Its bad faith is attested alike by the ease with which the employees could have been placed upon hourly rates as against the extremely complicated character of the payroll masquerade, by the ease with which they might alternatively have been placed upon 40 hour workweeks in the manner actually done under the Frankenthaler Agreement and, finally, by the contemporaneous evidences of the real purpose of the entire arrangement: to standardize a 46 hour workweek at a flat weekly wage through a device which would offset the full overtime costs which would otherwise ensue (Ex. 4, p. 70). In the face of this clear expression of the true purpose of the arrangement, the present attempt to find sanction upon the basis of practicability has all the defect of a posthumous rationalization.

The decision of the Court in *Walling* v. *Belo Corp.*, 316 U. S. 624, is distinguishable.

In the *Belo* case, the wage bargain had been made in terms of stated hourly rates. Thereafter the men received guaranteed weekly wages which were practically

always higher than the total of their straight time and overtime compensation as measured by the stated hourly rates. The Court found that the purpose of the guarantee was to insure a stable weekly income for men whose workweeks were so irregular that they would otherwise have been denied the benefit of a constant wage.

In this case, it cannot possibly be claimed that the parties had ever dealt with one another upon the basis of stated hourly rates. Nor can it be claimed that the employees themselves received any benefit from the payment of compensation in the form of a fixed wage for an extra-statutory workweek. For it is uncontradicted that, their workweeks having always been constant, their weekly earnings would have been regular however they had been determined. Far from seeking any object from which these employees could have benefitted, the sole purpose of the instant arrangement was to standardize an extra-statutory workweek through a formula "designed to offset the full overtime costs which would ensue if hourly rates were computed in the ordinary way" (Ex. 4, p. 70).

The Belo umbrella does not extend to such an arrangement.

The doctrine of the Courts below is implicit in the decisions of this Court in *Overnight Motor Transportation Co.* v. *Missel*, 316 U. S. 572, and *Walling* v. *Helmerich & Payne, Inc.*, 323 U. S. 37.

The identical plan has been rejected by the Circuit Court of Appeals for the Third Circuit. *Watkins* v. *Hudson Coal Co.*, 151 Fed. (2nd) 311, 316, cert. den. 66 S. Ct. 522. Learned counsel for the *amicus curiae*, in purporting to list the authorities relied on by the Administrator in his brief in *Walling* v. *Halliburton Oil Well Cementing Co.*, No. 74, this Term, failed to include that case

(Brief, p. 21, footnote). The formula involved in that case was identical with the one in the case at bar.

In *Walling* v. *Helmerich & Payne, Inc.*, 138 Fed. (2nd) 705, the Circuit Court of Appeals for the Tenth Circuit also held that this formula violated the Act. The "X-plan" there considered was identical with the formula in this case. Stated in terms of the workweeks of these plaintiffs, $40X + 6\left\{\frac{3X}{2}\right\}$ equals the weekly wage. Upon reduction, this equation becomes $49X$ equals the weekly wage, or the very formula with which we are here concerned.

We know of no decision to the contrary in any Circuit. Each of the decisions referred to in the briefs submitted on behalf of the Petitioners and of the *amicus curiae* is distinguishable. The common distinguishing characteristic arises from the differentiation which must be made between compensation derived from a stated hourly rate and a fixed weekly wage expressed in such a manner as to simulate an hourly rate derivation.

II.

It will be noted that the plaintiffs' right to recover under the Act for the period between April 20 and September 5, 1942 (the retroactive period) rests upon a different footing and is independent of the entire foregoing discussion. For, even assuming that defendants' entire device had been proper, it would still have been ineffective to release them from obligations which had already accrued. *O'Neil* v. *Brooklyn Savings Bank*, 324 U. S. 697.

The attempt to apply the formula *nunc pro tunc* brings its true function into clear relief. It is simply a mystic incantation, fashioned for the sole purpose of removing

any weekly wage contract whatsoever beyond the power and sphere of activity of the Fair Labor Standards Act.

III.

Public policy.

The endorsement of this arrangement would have one certain consequence. The hour ceiling under the Act would be gone. A fixed wage for a workweek far exceeding the statutory maximum and accompanied by a formula which need be no more than a pretense would become standard equipment for all contracts of employment.

The purpose of Congress to load overtime costs to the end of standardizing a 40 hour workweek would succumb before the bait of the weekly wage viewed as a whole. With the reduction of the overtime loading to a mere bookkeeping device, the workweeks of the future would be standardized at levels which cannot now be foreseen, except that they would be unaffected by the policy of the Act.

IV.

CONCLUSION.

The judgment of the Court below should be affirmed.

Respectfully submitted,

WILBUR DUBERSTEIN,
FREDERICK E. WEINBERG,
Counsel for Respondents.

Dated, January 31, 1947.

APPENDIX.

The pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C., Secs. 201 *et seq.*) are as follows:

> "Sec. 7 (a). No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce——
>
> (3) For a workweek longer than forty hours * * * unless such employee receives compensation for his employment in excess of the hours above specified at a rate of not less than one and one-half times the regular rate at which he is employed."

The Act contains another provision which emphasizes the purpose of Congress to standardize workweeks not exceeding 40 hours. Therein the Act provides that, while certain collective bargaining agreements may be exempt from the provisions of the Act, it shall be a condition of that exemption that the weekly average of the total hours of employment shall not exceed 40 hours. In other words, the exemption of a collective bargaining agreement is conditioned upon the observance of the requirement that the average workweek does not exceed 40 hours.

The section referred to is included under Section 7 and is as follows:

> "(b) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed——

(1) In pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand hours during any period of twenty-six consecutive weeks,

(2) on an annual basis in pursuance of an agreement with his employer, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that the employee shall not be employed more than two thousand and eighty hours during any period of fifty-two consecutive weeks."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 497

119 MADISON AVENUE CORP. and WILLIAMS & CO., INC.,

Petitioners,

v.

FRANK ASSELTA, CAMILO DEL RIO, JOSEPH McARDLE, SAMUEL MANNE, CORNELIUS McCOLE, BURTON PETERSON, FRANK RODRIGUEZ, JAMES TORRA, JOHN H. BERGER, and GEORGE BERGER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR MIDTOWN REALTY OWNERS' ASSOCIATION, INC., AMICUS CURIAE

SAMUEL I. ROSENMAN, *Counsel for*
MIDTOWN REALTY OWNERS' ASSOCIATION, INC.,
Amicus Curiae

SAMUEL I. ROSENMAN,
LOUIS A. GOLDMARK,
RICHARDS, SALANT,
Of Counsel

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IN THE

Supreme Court of the United States

October Term, 1946

No. 497

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149 Madison Avenue Corp. and Williams & Co., Inc.,
Petitioners,

v.

Frank Asselta, Camilo Del Rio, Joseph McArdle, Samuel Manne, Cornelius McCole, Burton Peterson, Frank Rodriguez, James Torra, John H. Berger, and George Berger.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR MIDTOWN REALTY OWNERS' ASSOCIATION, INC., *AMICUS CURIAE*

Opinions Below

The opinion of the District Court (R. 184-202) is reported at 65 F. Supp. 385. The opinion of the Circuit Court of Appeals (R. pp. 81-84) is reported at 156 F.(2d) 139.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on June 17, 1946 (R. pp. 84-85). The petition for a writ of certiorari was filed on September 13, 1946, and

granted on December 9, 1946. The jurisdiction of this Court is based upon Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented

Petitioners adhered to, and compensated their employees under, a master collective agreement. This agreement: (1) fixed the regular workweek for most building service employees at 46 hours and for watchmen at 54 hours; (2) provided a minimum weekly wage for such regular workweek; and (3) to determine the regular hourly rate of each employee, embodied the following formula: The employee's weekly wage for his regular workweek was divided by the sum of the number of hours of the regular workweek plus one-half the number of hours of such workweek which were in excess of 40.

This hourly rate thus computed under the formula was constant, and controlled all compensation paid to respondents, who received the hourly rate for all non-overtime hours worked and 150% thereof for each hour worked in excess of 40.

The question presented is whether the hourly rate of pay thus computed under the formula is the "regular rate" of pay upon which overtime compensation is to be computed under Section 7 of the Fair Labor Standards Act of 1938.

Statute Involved

The pertinent provisions of the Fair Labor Standards Act of 1938 (c. 676, 52 Stat. 1060, 29 U. S. C., sec. 201) are as follows:

> SEC. 7(a). No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce——
>
> * * * * * *

(3) for a workweek longer than forty hours after the expiration of the second year from * * * [the effective] date [of this Section], unless such employee receives compensation for his employment in excess of the hours above specified at a rate of not less than one and one-half times the regular rate at which he is employed.

The Interest of Amicus Curiae

Midtown Realty Owners' Association, Inc., *amicus curiae*, is an association of owners and managing agents of commercial loft buildings in the so-called garment center in New York City. Prior to the agreement in issue in the instant case, Midtown Realty and Local 32B, Building Service Employees International Union, A. F. of L., entered into a collective bargaining contract governing the terms and conditions of employment of building service employees in the buildings owned or operated by Midtown members. Pursuant to an arbitral award of Arthur S. Meyer, this agreement between Midtown Realty and Local 32B embodied the so-called "Meyer formula" and certain other provisions governing wages and hours. The National War Labor Board ordered the inclusion of the same formula in the agreement which gives rise to the instant case.

Hence this Court's determination of the instant case will have a direct impact upon the validity of the Midtown agreement, many suits under which have been brought by employees, and are now pending.

Statement

1. *The Parties.* Petitioners are the owner and managing agent of a "Class C" loft building in New York City (R. 162-163, 166). Respondents are or have been maintenance and operating employees in such building, performing services as elevator operators, porters, firemen,

watchmen, and handymen (R. 164-165). The parties have stipulated that the respondents are covered by the Fair Labor Standards Act (R. 220).

2. *Local 32B and the Realty Advisory Board.* Since 1934, collective bargaining for buildings like that here involved, as well as for other types of buildings, has been conducted on an industry-wide basis (Ex. 4, p. 7). The employees have been represented by Local 32B of the Building Service Employees International Union, A. F. of L., whose membership in 1942 was approximately 30,000 out of some 76,400 employees eligible for membership (Ex. 4, p. 4). It is "the dominant labor organization among building service employees in Manhattan" (Ex. 4, p. 41).

Except in respect of buildings in the "garment center," which are represented by the Midtown Realty Owners' Association, Inc. and the Penn Zone Association, Inc. (Ex. 4, p. 16), the owners and managing agents have conducted this industry-wide bargaining through a voluntary organization known as the Realty Advisory Board on Labor Relations, Inc. (Ex. 4, p. 5). The Board represents some 2225 buildings, which have 20,784 employees. These buildings vary greatly in type, function, age, size, clientele and methods of operation. They include office buildings, loft and apartment houses. (Ex. 4, p. 8.) The Realty Advisory Board acts in an advisory capacity to the member buildings, and assists in the negotiation of contracts. No member building, however, is bound to accept agreements negotiated by the Board. (Ex. 4, p. 5.) The owners and operating agents of each building are bound by any agreement only if, and when, each accepts it (Ex. 4, p. 5).

3. *The Sloan Agreement.* For the period preceding April 20, 1942, the wages and working conditions of member buildings and their employees were governed by the Sloan Agreement (Ex. 3; Ex. 4, p. 9). This Agreement

provided, for Class C loft buildings like petitioners', a flat minimum weekly wage of $25 (Ex. 4, pp. 12-13). A work-week of 47 hours was established for all employees except watchmen, whose hours were set at 59 (Ex. 4, p. 14). The Sloan Agreement made no attempt, explicitly or imlicitly, to set forth an hourly rate and hence, concededly, falls within the ambit of *Overnight Motor Co.* v. *Missel*, 316 U. S. 572.[1]

4. *Events Preceding the National War Labor Board Agreement.* Negotiations between Local 32B and the Realty Advisory Board, looking toward a new agreement, began in March 1942, before the expiration of the Sloan Agreement. The negotiations were unsuccessful and the dispute was referred to the New York State Mediation Board. The Board's efforts were fruitless; so were negotiations before a representative of the office of the Mayor of New York City. On May 1, 1942, Local 32B called a partial strike. On the same day, in accordance with the procedure prescribed under Executive Order 9017 (promulgated January 12, 1942; 7 Fed. Reg. 237), the Secretary of Labor certified the dispute to the National War Labor Board. The strike was then terminated. (Ex. 4, p. 6.)

A Panel of the National War Labor Board[2] held hearings from May 18 to June 1, 1942. The Panel failed in its efforts to secure an agreement between the parties, and parties submitted testimony, documentary evidence and briefs. (Ex. 4, p. 6.)

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[1] There no longer is any question in this case of petitioners' liability under the Act for the period covered by the Sloan Agreement. Full payment, including attorneys' fees and liquidated damages, computed on the *Missel* formula, has been made for this period (R. 216-218).

[2] The Panel was composed of Ralph T. Seward, representing the Public, Dale Purves, representing the Employer, and Frank Tobin, representing the Employee (Ex. 4, p. 56).

On July 17, 1942, the Panel issued its Report and Recommendations (Ex. 4, pp. 4-72). On July 29, 1942, the National War Labor Board issued its Directive Order[3] under Paragraph 3 of Executive Order No. 9017, embodying the Panel's recommendations (Ex. 4, p. 3).

On September 1, 1942, Local 32B and the Realty Advisory Board entered into an agreement, known as the "National War Labor Board Agreement," embodying the terms of the War Labor Board Directive Order (Ex. 1). The instant dispute arises out of those terms of this Agreement which relate to the computation of the hourly rate of pay.

5. *The National War Labor Board Directive Order and Agreement—the Meyer Formula.*[4] The National War Labor Board ordered, and the subsequent agreement provided, that the minimum weekly earnings, for the regular workweek, for Class C loft buildings be increased from $25 to $27.50 (Ex. 4, pp. 30, 32; Ex. 1, pp. 6, 25). For elevator starters and assistant elevator starters, the minimum for the regular workweek was increased from $26 to $28.50, and for handymen from $27 to $29.50 (Ex. 4, pp. 30-31; Ex. 1, p. 25). The wages of all employees who received more than the minimum were increased by an amount which would maintain the existing dollar differentials (Ex. 4, pp. 30-31; Ex. 1, p. 26).[5] The regular workweek of watchmen was reduced from 59 hours to 54, and the regular

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[3] The Directive Order was signed by Frank P. Graham, Robert F. Black, Wayne L. Morse, Richard T. Frankensteen, Roger D. Lapham and Martin P. Durkin.

[4] The dispute, and hence the Directive Order and subsequent Agreement, concerned a number of issues other than wages and hours. Also involved were issues such as maintenance of membership, vacations and an arbitration clause (Ex. 4).

[5] Thus a handyman who received $28 under the Sloan Agreement ($1 more than the minimum) received $30.50 under the National War Labor Board Agreement.

workweek of all others regularly employed was reduced from 47 hours to 46 (Ex. 4, p. 33; Ex. 1, pp. 27-28).[6]

In addition, the Panel Report and Recommendations, embodied in the Directive Order, provided (Ex. 4, pp. 33-34):

> "It was understood at the hearing that if the Board set hours for offices and lofts above the 40-hour maximum demanded by the Union, the parties would adopt the formulae of the Meyer Agreement for the calculation of hourly rates, and the fixing of overtime. These formulae were introduced because of the prospective application to loft buildings of the Fair Labor Standards Act. We quote and explain them in Appendix B [Ex. 4, pp. 70-72]. As they have been accepted in principle by the parties, we believe they should be incorporated into the present contract."

While "leaving . . . the exact language" of the Meyer Agreement clauses to "direct negotiations," the Panel stated that it "considers both parties bound to accept the principles of the Meyer Agreement formulae without change" (Ex. 4, p. 70). The Meyer formula, which, as the Panel noted, was itself embodied in an arbitral award covering the garment center buildings and rendered by Arthur S. Meyer (Ex. 4, p. 16), was fully explained by the Panel and the relevant provisions of the Meyer Agreement were set out in its Report (Ex. 4, pp. 70-72).

In accordance with the Report and Recommendations of the Panel, later made the Directive Order of the War Labor Board, the Meyer formula and the relevant provisions of the Meyer Agreement were embodied in the final agreement

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[6] The agreement, as required by the National War Labor Board, provided that the new wages and hourly rates be retroactive to April 21, 1942. However, since the employees had already worked between April 21, 1942 and August 10, 1942 (when the workweek was reduced to 54 hours for watchmen and 46 for other employees, in anticipation of the agreement), the reduced workweek could not be made retroactive. Hence, during the interim period, the workweek necessarily remained at the hours fixed by the Sloan Agreement.

between Local 32B and the Realty Advisory Board. The Meyer formula provided that (Ex. 4, p. 71; Ex. 1, p. 27):

> "The hourly rates for those regularly employed more than forty (40) hours per week shall be determined by dividing their weekly earnings by the number of hours employed plus one-half of the number of hours actually employed in excess of forty (40) hours."

The "regular weekly hours" for employees other than watchmen were set at 46, and for watchmen at 54; regular working hours in excess of 40 were not to be reduced by the employer in order to effect a corresponding reduction in pay (Ex. 4, pp. 71-72; Ex. 1, pp. 27-28). Employees were to receive "at least time and one-half" for overtime for hours in excess of 40 but less than 46 hours (54 in the case of watchmen), and one and three-quarters for overtime in excess of 46 hours (double time for hours in excess of 54 in the case of watchmen) (Ex. 4, p. 72; Ex. 1, p. 29). In the event of absences for sickness or other excusable causes, the straight hourly time as computed under the Meyer formula was to be deducted for the number of hours absent (Ex. 4, p. 72; Ex. 1, p. 29). The agreement further expressly stated the intention of the parties to be that "the wages paid, as provided for in this agreement . . . shall constitute full payment for services rendered under this agreement" (Ex. 1, p. 7).

6. *The Operation of the Meyer Formula.* Respondents were employed and paid in accordance with the terms of the National War Labor Board Agreement (R. 120, 147). Subsequent to the execution of that Agreement, their weekly payrolls reflected the number of hours worked each day, the total number of non-overtime hours (40 or less), the hourly rate for regular time (40 or under), the wages paid for such non-overtime hours, the number of overtime hours (i. e., over 40), the overtime rate (e. g., 150% for hours between 40 and 46), the wages paid for overtime hours, the total number of hours worked each week and the total pay (Ex. 6, pp. 36-103).

Thus from September 5, 1942 to April 21, 1943 (when wages were again increased), respondent Peterson's regular workweek was 46 hours and his weekly earnings $27.50 (Ex. 6, e. g., p. 36). During this period, the Meyer formula thus yielded him an hourly rate of $.561+

$$\left(\frac{\$27.50}{46 + \frac{1}{2} \times 6} = \frac{27.50}{49} = .561+\right),$$

and an overtime rate for hours in excess of 40 but not more than 46 of $.843. He was compensated on this basis for all hours worked by him. When, in the course of a workweek, he was absent for inexcusable cause for 23 hours, he was paid $12.90 (23 X .561) (R. 143-144; Ex. 6, p. 60). In another workweek, he was absent for excusable cause for 16 hours, and thus worked for 30 hours. Accordingly, 16 hours at straight time (16 X .561 or $9) was deducted, and he received $18.50. (Ex. 6, p. 48.)[7] In a third week, Peterson worked 52 hours, six more than the regular workweek. For this week, the payroll shows that he received $22.44 for the first 40 hours (40 X .561), plus $5.06 for the next six hours (6 X .843, time and a half), plus $5.88 for the next six hours (6 X .98, time-and three-quarters) —or a total of $33.38 (Ex. 6, p. 55).

Thus, whether Peterson worked 23 hours, 46 hours or 52 hours, his regular hourly rate remained constant and did not fluctuate in order to yield the earnings prescribed for his regular workweek.

7. *Opinions of the Courts Below.* The District Court held that the wage payments under the National War Labor Board Agreement did not comply with the Act. It found that the Meyer formula "was designed to offset the full overtime costs which would ensue if hourly rates were computed in the ordinary way," and that its purpose was "to

[7] See Ex. 1, Sec. III, par. 5(i), p. 29. The deduction was reflected on the payrolls by showing 24 hours at straight time (24 × .561 = $13.44) and 6 hours at time and a half (6 × .843 = $5.06). See R. 141-142.

reduce the hourly rate sufficiently so that the payment of time and a half for overtime would not bring the total weekly earnings substantially above the weekly rates set by the agreement" (R. 171-172). In its opinion, the Trial Court stated that "The fact that defendants here actually applied in all situations the hourly rates so derived [from the formula] does not validate such rates" (R. 200) since such hourly rates "bore no relation to the regular rate of the workweek as defined in Overnight Motor Co. *v.* Missel"[8] (R. 198-199).

The Circuit Court of Appeals affirmed on the ground that the effect of the use of the formula was to preclude payment of more than the agreed weekly wage except where the employee worked in excess of the regular workweek. It held that the statutory purposes were thwarted since employment was based "upon a regular unvarying weekly wage for a workweek in excess of the statutory minimum hours" and since the weekly wage was then broken "down into so-called regular and overtime hourly rates by means of a formula so the weekly wage actually definitely fixed is seemingly transferred into an hourly wage rate" (R. p. 84).

Specification of Errors

The court below erred:

1. In holding that the hourly rates computed under the Meyer formula were not the "regular rates" at which respondents were employed within the meaning of Section 7 of the Fair Labor Standards Act.

2. In affirming the judgment of the District Court which granted recovery to respondents against petitioners for overtime wages, liquidated damages, attorneys' fees and costs and disbursements.

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[8] 316 U. S. 572.

Summary of Argument

The hourly rate computed under the Meyer formula and specified in petitioners' payrolls is the statutory "regular rate." It reflects all payments for normal non-overtime work. The Meyer formula, and the hourly rate derived under the formula, was not imposed by unilateral action but as the result of collective bargaining and of a Directive Order of the National War Labor Board. Because the collective contract was a master agreement which covered a variety of buildings and numerous classes of employees receiving a large number of differing weekly rates of pay for their regular workweek, no specific statement of hourly rates in terms of dollars and cents was feasible. Instead, the minimum weekly rates for the regular workweek of 46 or 54 hours were specified, and the Meyer formula was embodied so that the hourly rate of each employee could be computed. The formula is not an arbitrary mathematical device, but is simply an algebraic restatement of the Fair Labor Standards Act.

The collective agreement did not provide a flat weekly salary which served as a fixed measure of compensation regardless of the number of hours worked. Rather, since the weekly earnings specified in the agreement were for a fixed workweek, the divisor in the Meyer formula was constant. Hence the hourly rate computed under the formula was also constant, and immediately ascertainable in advance. The hourly rate thus computed controlled all compensation to respondents. They received the hourly rate for all hours worked up to 40, 150% of the rate for all hours worked over 40, and 175% of the rate for all hours worked over 46 (200% for hours over 54 in the case of watchmen). Accordingly, respondents' weekly pay varied, as required by the Act, as the number of hours which they worked varied.

For this reason, the Meyer formula is wholly consistent with the statutory purposes. Petitioners' labor costs were

increased by 50% at the end of 40 hours, and respondents received a 50% premium for all hours in excess of 40.

The mere fact that the Meyer formula does not yield as high an hourly rate as computation under the *Missel* formula does not affect this conclusion. The weekly earnings for the regular workweek were expressly intended to be the total of an allocation between straight time for 40 hours, and time and a half for overtime. Furthermore, in any event, the Act does not bar an employer from paying the same wage as the employees formerly received, so long as the rate exceeds the statutory minimum. In a contemporaneous construction of the Act, the Administrator of the Wage and Hour Division in fact sanctioned precisely the method of computation utilized in the instant case. 3 Wage and Hour Reporter 228.

ARGUMENT

THE HOURLY RATE DETERMINED BY THE MEYER FORMULA AND APPLIED IN WAGE PAYMENTS TO RESPONDENTS IS THE "REGULAR RATE" WITHIN THE MEANING OF SECTION 7 OF THE FAIR LABOR STANDARDS ACT.

A. The Validity of the Meyer Formula Is Not Controlled by Earlier Cases Decided by This Court, Holding That Specified Hourly Rates Are Not the "Regular Rates."

In this case, an organization representing a large number of building owners and agents, including petitioners, entered into a master collective agreement with a labor union representing the building service employees who were members of the union. The agreement specified a minimum weekly rate for each category of employee, and provided the method by which all other weekly rates above the minimum were to be determined. The weekly rate represented the amount to be paid for the regular workweek, which was set at 46 hours for all regularly employed full-time employees except watchmen, whose hours were 54.

And the agreement embodied an algebraic method, known as the Meyer formula, for determining the regular hourly rate for each employee whose workweek was thus fixed at a specified number of hours in excess of 40. Because the number of hours was so fixed, the regular hourly rate computed under the formula was necessarily constant for each employee, and his weekly earnings accordingly varied, dependent upon the number of hours he actually worked each week.

Petitioners, in preparing their weekly payrolls, reduced the weekly rate specified for each employee under the agreement to an hourly rate by means of the prescribed formula. The computation of each employee's weekly earnings was made on each payroll on the basis of the hourly rate so computed, with 150% (or in circumstances defined by the agreement, 175% or 200%) thereof for overtime (Ex. 6, pp. 36-103).

Thus, this case contrasts sharply with the earlier hourly rate cases decided by this Court in which the employer was found to transgress the Act. In *Overnight Motor Transportation Co.* v. *Missel*, 316 U. S. 572, there was no question whether a specified hourly rate was the true statutory rate, since there, only a flat weekly wage was specified in the employment contract; there was no statement of an hourly rate. In the remaining three cases,[9] the employment contract specified a purported hourly rate, which, however, failed to reflect all the earnings of the employees for normal non-overtime hours.[10]

No such situation is presented by the instant case. Unlike the *Missel* case, the precise method of computing the

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[9] *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419; *Walling* v. *Harnischfeger Corp.*, 325 U. S. 427; *Walling* v. *Helmerich & Payne*, 323 U. S. 37.

[10] In *Youngerman-Reynolds*, the specified hourly rate excluded a regularly received piece-work guaranty; in *Harnischfeger*, the hourly rate ignored a regularly received "incentive bonus" or "piece-work earnings"; and in *Helmerich & Payne*, the hourly rate was based on an arbitrarily chosen fraction of the regular day worked.

regular hourly rate was here specified in the master agreement, and only the regular hourly rate thus computed was used in the petitioners' payrolls and payments. And while the ultimate question in this case, like that in the *Youngerman-Reynolds, Harnischfeger* and *Helmerich & Payne* cases, is whether the hourly rate specified is the statutory rate, in this case, unlike those cases, there was no arbitrary and abnormal exclusion of usual earnings for non-overtime work in the computation of the rate.

Accordingly, if the hourly rate derived from the Meyer formula is invalid, it is invalid only because the statement in the master agreement of the minimum weekly rate for the fixed workweek overrides the express intention of the parties and the explicit statement, and use, of a fixed regular hourly rate for each employee for hours up to 40, and time and a half for hours over 40. We shall show that the circumstances which gave rise to the Meyer formula, and the method of its actual operation, preclude such a conclusion.

B. The Circumstances Leading to the Adoption of the Meyer Formula Establish Its Bona Fides.

At the threshold, the genesis of the Meyer formula is to be emphasized.

The Meyer formula and the Meyer clauses had their inception in another master agreement between Local 32B and the Midtown Realty Owners' Association, Inc., (*amicus curiae*) covering loft buildings in the garment center. The formula and the clauses had been embodied in that agreement as a result of an arbitral award issued by Arthur S. Meyer, Chairman of the New York State Mediation Board. (Ex. 4, p. 16.) In the negotiation of these agreements, the employees were represented by the "dominant" labor union in the field (Ex. 4, p. 41). And the instant agreement embodying the Meyer formula was even more than the product of vigorous collective bargaining between equally strong groups. It was the climax of State and City mediation, a strike, and, after hearings, a Directive Order of the

National War Labor Board. Indeed, since the Panel explicitly stated its expectation that the Meyer formula and clauses would be included in the agreement without substantial change (Ex. 4, p. 70), the Directive Order itself would have been violated had the Meyer formula and the Meyer clauses been omitted from the master agreement.

It is against this background that the validity of the hourly rates computed under the Meyer formula must be judged. The background, we submit, negates any conclusion that the Meyer formula was any invention by the employers conceived with sinister purpose and imposed by the employers upon employees in order to deprive them of their rights under the Act.

Similarly, the circumstances which impelled the use of the formula disclose that it is not merely an "ingenious mathematical manipulation" (see *Helmerich & Payne* case, 323 U. S. 41) whose only rationale can be the setting of an arbitrary hourly rate which would permit the evasion of the Act. On the contrary, the critical provisions of the National War Labor Board Agreement find their basis in sound and practical considerations.

The parties negotiating the collective agreement were faced with a knotty practical problem. As we have seen (Statement, p. 4), the Realty Advisory Board had no power to bind its members; each was free to accept or reject the agreement. Over 2200 buildings of every type and character were involved. Over 20,000 employees were affected. Not only were the employees in different categories of employment, commanding different wage classifications, but even those within the same category in the same type of building did not receive identical wages.

Necessarily, therefore, the contract had to be in the form of a master agreement. And, by the same token, the agreement necessarily could do no more than provide, in the most specific manner possible, the mathematical bases for computing the pay of each employee. Thus, the agreement set minimum weekly earnings for the regular workweek for each class of employees and provided for a method of deter-

mining weekly earnings above the minimum from that point.[11] And, in turn, the next step of enunciating a method of reducing to an hourly rate whatever weekly rate was thus arrived at, was taken by embodying the Meyer formula.

The circumstances did not lend themselves to any other arrangement. Since the agreement set out only the minima for each class of employees, and provided the means of determining the pay for the regular workweek for those receiving *more* than the minimum (Ex. 1, p. 26), the problem of writing into the master agreement the specific hourly rates, in terms of dollars and cents for each class of employee in each building, would not have been at all feasible. It would have been necessary to set out such a specific hourly rate for each possible total of weekly earnings above $27.50 for a regular workweek of (a) 46 and (b) 54 hours.[12] While hindsight might have dictated some such unwieldy attempt, it was not a process which would suggest or commend itself.

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[11] Thus Ex. 4, Sec. III, Par. 3, p. 53 provided:

> "All employees covered by this agreement in Class 'A', 'B' and 'C' loft building who on the date of the Directive Order of the National War Labor Board in Case No. 141 . . . were receiving more than the minimum for their classification established by the Sloan Agreement, shall receive an increase equivalent to that awarded other employees in a like classification. To illustrate: The minimum for a handyman in a Class 'B' loft building under the Sloan Agreement was $28 per week. The new minimum is $31.40. If a handyman in such a building had been receiving $30 per week, he should now receive $33.40 per week."

[12] In the court below, respondents suggested that no such multiplicity was required, since it is as simple to state the hourly rates as it is to state the weekly earnings; and that there could have been no greater number of fixed hourly rates than there were of fixed weekly wages paired up with fixed workweeks. But this suggestion rests on a misapprehension, for the agreement did not state a series of fixed weekly earnings. As already noted, the agreement fixed only a minimum for each category, and, in the manner described in the preceding footnote, provided the formula for computing all

(Footnote continued on next page)

This is particularly true here since this was a field, like many other fields of non-industrial employment, where basic earnings are normally stated in weekly, rather than hourly, terms, and where the employees, accustomed to a statement of basic weekly earnings, are not primarily interested in hourly rates. In a master collective agreement of this nature it was far simpler and far less abnormal simply to set out the methods of arriving at the various weekly earnings for the regular workweek and at the multiple hourly rates, and await the translation of their bases into hourly rates in terms of specific cents through the medium of the operative payrolls which each building used. This is precisely what was done.

Thus, respondents' contention (brief in opposition to petition for certiorari, pp. 11-14) that the method of stating the wages embodied in the agreement was conceived with some sinister purpose of deceiving the employees and "simulating substantial wage increases" is wholly negated. It is hardly probable that either the National War Labor Board or Local 32B, representing respondents, would have made themselves active parties—as they did—to any such purpose.

In any event, respondents are inaccurate in their basic premise that, had the actual hourly rates been stated, it would have disclosed "insignificant increases" or "substantial reductions" and hence would have been rejected by the

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weekly earnings above the minimum. And in any event, no meaningful provision relating to hourly rates parallel to that relating to weekly earnings could be devised. While the *minimum* hourly rates could have been stated, there was no established hourly differential; as there had been an established differential for weekly rates, existing to identify the hourly rates above the minimum. For under the predecessor Sloan Agreement, there were no hourly rates, and as noted by respondents in their brief in opposition to the petition for certiorari (p. 12), it was not until later that the calculations under the *Missel* formula were completed for the purposes of computing the amounts due under the Sloan Agreement.

employees.[13] The short answer is that the new hourly rates prescribed in the agreement for Local 32B employees were, after August 10, 1942, substantially higher, in all cases, than the hourly rates under the Sloan Agreement recomputed by the *Missel* formula.

For example, the Sloan award prescribed a minimum weekly wage of $25 for a regular workweek of 47 hours. For this the *Missel* formula yields an hourly rate of a trifle under $0.532. Yet the same employee, under the National War Labor Board Agreement and its Meyer formula, received, after August 8, 1942, an hourly rate of $0.561—or an increase of almost 5½%.

The record, we submit, accordingly establishes a sensible and practical rationale for the provisions of the National War Labor Board Agreement and requires rejection of respondents' speculations concerning the reasons for them.

C. The Meyer Formula Is Not an Artificial Device but Is a Restatement of the Act Itself.

The Meyer formula is not an arbitrary algebraic device without rational basis. On the contrary, the formula is simply a restatement of the Act itself. Thus, let us suppose a Wage-and-Hour-minded algebra teacher were to put the problem to his students of arriving at the statutory regular rate of employees of an employer who has set such a rate, who pays 150% of such rate for each hour worked in excess of 40, and whose employees' regular workweek is 50 hours, for which they receive $55 each week. Of course, the answer will be yielded only by the Meyer formula.

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[13] The "New Hourly Rate" set forth in respondents' brief in opposition (p. 11) is the rate only from April 21, 1942 to August 8, 1942. The rates for McCole were necessarily lower since the employees were still operating under the Sloan Agreement and hence worked 47 or 59 hours. On August 8, shortly after the NWLB Directive Order, the hours were reduced to 46 and 54 hours in anticipation of the NWLB Agreement. And while the latter provided that the wage increases were retroactive to April 21, 1942, it was impossible similarly to provide in respect of the reduction in hours.

This is why it is not sufficient to condemn the formula, as respondents have contended because the formula is, in a sense, "tautological". It is entirely true that if the starting point is weekly earnings for a regular workweek in excess of 40 hours (and in a great many non-industrial fields of employment, that is the natural starting point), the Meyer formula does no more than yield a regular hourly rate which, together with time and a half for overtime, equals such weekly earnings. That is inherent in the process. But to conclude that it therefore transgresses Section 7 of the Act is in all cases to prohibit the statement of weekly earnings for a regular workweek in excess of 40 hours. For even where, as in this case, such statement of weekly earnings is expressly intended as the total of straight time for hours up to 40, and time and a half for the fixed hours in excess, the statement would, under respondents' contention, nevertheless be nullified by a rule that the weekly earnings must be divided by the regular hours worked. If this were true, the Act would in all cases preclude the statement of weekly earnings for a fixed workweek in excess of 40 hours, for there would necessarily be an infinite progression caused by the necessity of dividing each new total figure by the hours worked.

The Act requires no such startling result. Nor, as would seem to be implicit in respondents' contention, can compliance with the Act hinge upon the elusive inquiry into the mental processes by which the employer arrives at weekly earnings. Thus, it seems to be suggested that if the employer's mind dwells first on an hourly rate, from which is derived a statement of weekly earnings, there is compliance with the Act. But, on the other hand if (as is perfectly natural, since an employer must necessarily base wages on his total labor costs) an employer's starting point is the amount to be paid each week for a fixed workweek in excess of 40, he cannot, consistently with Section 7, break that down to an hourly rate which, when multiplied by 1½ for the overtime hours, would yield the weekly rate which he believes should be paid for the fixed workweek. Certainly

the Act does not turn upon any such psychoanalytical distinctions which yield no difference in result.

Rather, as the *Missel* case holds, the Act forbids a flat weekly rate regardless of the number of hours worked, and, as the *Belo* (316 U. S. 624), *Harnischfeger*, *Youngerman-Reynolds*, and *Helmerich & Payne* cases hold, it also forbids the setting of a fictitious hourly rate.

Both these tests are squarely met in this case.

D. The Agreement Did Not Provide for a Flat Weekly Wage and the Hourly Rates Derived Through the Meyer Formula in Fact Controlled the Compensation Received by Respondents.

This is not a case, like *Missel*, of a flat weekly rate paid regardless of the number of hours worked. Nor is it a case where the hourly rate fluctuates from week to week, dependent on the number of hours worked, the fluctuations designed solely to arrive at a specified flat weekly rate. Rather the Agreement provides (Ex. 1, Sec. III, par. 2, p. 26) only the amount which is to be paid to employees who work for the exact number of hours comprising the fixed regular workweek. And, since the statement of weekly earnings was thus coupled with a fixed workweek for each employee, the divisor of the Meyer formula was constant, set at 49 for all employees other than watchmen for whom the divisor was 61. Thus each employee's regular hourly rate immediately became fixed and invariable (unless, as occurred in April 1943, there was a general increase in the wage scales pursuant to Ex. 1, Article III, par. 3, p. 6), and, as will be discussed more fully below (pp. 22-22), such rate controlled all wage payments to respondents.

The central fact, therefore, is that the weekly earnings varied according to the number of hours actually worked; the regular hourly rate for non-overtime work, however, did not fluctuate. It is in this critical respect that the instant method of computing an hourly rate differs from the so-called "X-plan," which the Administrator has described in his brief in *Walling v. Halliburton Oil Well Cementing*

Co., No. 74, this Term (pp. 18-19). For the X-plan, as he there described it, applies "varying rates to achieve a constant weekly wage for a workweek in excess of the statutory minimum," the formula of which "utilizes a constant overtime rate and a variable 'regular' rate."

Plainly, when such a device is used, there is no statutory hourly rate. Rather, the X-plan simply varies the hourly rate from week to week, depending on the number of hours worked, so as to yield the fixed and controlling weekly rate; under the X-plan, the more hours the employee works in any week the smaller his hourly rate in that week, and the less hours he works, the greater his hourly rate. And whether he works 30, 40, 50, or 60 hours a week, he receives the same amount, for only his "regular" hourly rate changes. Thus, under the X-plan, the weekly rate, and not the purported hourly rate, is determinative. And it is precisely this feature of the X-plan which has been condemned by the courts. See *Walling* v. *Helmerich & Payne*, 138 F. (2d) 705 (C. C. A. 10).[14]

Thus, it is clear that this case does not involve a fixed weekly wage plan which uses the X-formula to vary the hourly rate from week to week for the single purpose of paying the weekly wage regardless of the number of hours actually worked. Rather, here there is a statement of the weekly sum due if, and only if, the employee works the precise number of hours comprising the workweek. And

[14] In his brief in the *Halliburton* case, the Administrator also cites *Castle* v. *Walling*, 153 F. (2d) 923 (C. C. A. 5); *Patsy Oil and Gas Co.* v. *Roberts*, 132 F. (2d) 826 (C. C. A. 10) and *Seneca Coal and Coke Co.* v. *Lofton*, 136 F. (2d) 359 (C. C. A. 10) as involving, and condemning, the X-plan. But in each of these cases, the employment contract set forth only a flat monthly or weekly rate, and did not even purport to specify an hourly rate or the means of computing such a rate; nor was the workweek fixed. The court in each case properly held that the *Missel* case required rejection of the employer's contention that, *ex post facto*, the court itself should supply an hourly rate for each week determined by the X-formula. These cases are plainly inapposite to the instant case.

from this weekly sum is derived a constant hourly rate by means of the Meyer formula.

The remaining question, therefore, is whether this constant hourly rate so derived is fictitious. Whether a rate is fictitious, and hence invalid, hinges on whether it actually controls the compensation received by the employees. *Harnischfeger* case, 325 U. S. at 424; *Youngerman-Reynolds* case, *supra*, 325 U. S. at 432; and see dissent in *Belo* case, *supra*, at 637. The method of compensation involved in this case meets this test.

In sharp contrast to the cases just cited in which the Court condemned the purported regular rate, in this case the hourly rate specified in the payrolls for each employee did in fact control their compensation in all circumstances. Thus, regardless of the number of hours worked, each employee's total pay for the week was computed on the basis of the hourly rate for hours worked under 40, and 150% (or, in specified circumstances, 175% or 200%) thereof for hours in excess of 40. If an employee worked less than 40 hours, and the cause of his absence was not excusable, he received his hourly rate times the number of hours he worked.[15] If he worked for his regular workweek of 46 hours, he received the total of (a) 40 times his regular hourly rate, and (b) six times 150% of his regular hourly rate. If an employee worked for more hours than his regular workweek of 46 hours, he received the total of (1) 40 times his hourly rate; (2) 150% of his hourly rate for the next six hours; and (3) 175% of his hourly rate for each hour in excess of 46 (Ex. 6, p. 55). And while the payrolls do not show that such an instance actually occurred in the case of any of the respondents, had any employee worked for more than 40 hours, but less than his regular workweek, and his absence was not for excusable cause, he would have

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[15] If his absence was excusable, he was paid time and a half for those hours which would, but for the excusable absences, have exceeded 40 hours, and straight time for the remaining hours actually worked (R. 141-142; Ex. 6, p. 48).

received the total of (1) 40 times his hourly rate; and (2) 150% of such rate for each hour over 40 (R. 143).[16]

Thus it will be seen that this case rests on an even sounder footing than the *Belo* case. For there, the guaranty controlled and the hourly rate never was actually applied in any case where the employee worked less than 54½ hours. In this case, the hourly rate was determinative whether the employees worked the regular workweek, or more, or less. And for each hour between 40 and their regular workweek, they received time and a half, and time and three-quarters or double time (in the case of watchmen) for hours in excess of their regular workweek.

Plainly, therefore, the court below fell into error in condemning the Meyer formula on the ground that its effect was to preclude payment of more than the agreed weekly wage except where the employee worked in excess of his regular workweek (R. p. 83). While this is quite true, it does not vitiate the method of compensation, for the weekly earnings themselves, as we have seen, comprised straight time for 40 hours, and time and a half for the remaining hours of the regular workweek. Hence, of course, no employee received pay for more than his regular workweek when he worked exactly the number of hours which constituted the workweek. Surely where an employment contract designates a regular hourly rate of, for example, 50 cents, and also sets the regular workweek at 46 hours, it does not transgress the Act simply because the employee receives only $24.50 (40 X .50 [$20.00] plus (1½ X .50) X 6 [$4.50]) for the 46 hours, and must work more than the

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[16] Thus, it is expressly stipulated (R. 143) that: "If when during any workweek an employee was absent for an inexcusable cause and therefore actually worked less hours than regularly scheduled, he was paid for the number of hours actually worked on the basis of regular time, *i.e.*, at the hourly rate as computed in the contract, *except for hours actually worked in excess of 40 hours in which latter event he would be paid for such excess hours at the rate of one and one-half times the hourly rate as computed in the contract.*" (italics supplied)

46 hours to receive more than $24.50. Yet that is precisely what the court below held.

E. The Meyer Formula and the Method of Compensation Thereunder Is Consistent with the Statutory Purposes.

The court below concluded that the Meyer formula "circumvent[s]" the Act and "negate[s] the statutory purposes to base employment upon a regular unvarying weekly wage for a workweek in excess of the statutory minimum hours and then merely break that down into so-called regular and overtime hourly rates by means of a formula so the weekly wage actually definitely fixed is seemingly transferred into an hourly wage rate" (R. p. 84). But its basic premise is mistaken. For, as we have noted (*supra*, pp. 20-22), there is no "definitely fixed" or "regular unvarying weekly wage irrespective of the number of hours worked." True it is that the statutory purposes would be thwarted if the weekly wage were fixed and unvarying, regardless of the number of hours worked.

This was the situation in the *Missel* case (316 U. S. at 574), where the employee received no overtime unless he worked almost 80 hours; in the *Helmerich & Payne* case (323 U. S. at 39), where the employee received overtime only if he worked more than 80 hours; and even in the *Belo* case (316 U. S. at 637), where no overtime accrued until 54½ hours were worked. Similarly this is the situation under the X-plan, where the employee receives no overtime, and a constant weekly rate, regardless of the number of hours worked (which are limited only by reaching that point where the divisor would become so large that the "hourly rate" would fall below the statutory minimum). But in the instant case, as we have seen, the hourly rate is constant, is applied to all non-overtime hours, and at least 150% thereof is paid for every hour over 40.

Hence the statutory purposes are here fully satisfied. As pointed out in the *Helmerich & Payne* case (323 U. S. at 40), "the Congressional purpose of enacting § 7(a) was twofold: (1) to spread employment by placing financial pressure on the employer through the overtime pay require-

ment . . . ; and (2) to compensate employees for the burden of a workweek in excess of the hours fixed in the Act." Thus the Section was intended to increase "the employer's labor costs by 50% at the end of the 40-hour week" and to give "the employees a 50% premium for all excess hours." *Youngerman-Reynolds* case, 325 U. S. at 423.

The instant plan of payment achieves precisely these purposes. After the fortieth hour of work each week, petitioners' labor costs were increased by 50%, and each employee received a 50% premium. For, as we have seen, if an employee whose regular hourly rate was $.561 worked for 40 hours, he received $22.40; but if he worked 41 hours, he received not an additional $.561, but rather an additional $.843—i. e., 150% of his hourly rate.

Nor is the Meyer formula vitiated, as the District Court thought (R. 171; Ex. 4, p. 70) and as respondents have contended, simply because it may yield an hourly rate lower than the rate which the *Missel* formula would yield.[17]

There is nothing in the Act which requires that in cases where more than the statutory minimum is paid (as here), there must be an increase in the take-home pay of all employees working more than 40 hours by an amount equivalent to 50% of the prestatutory hourly rate for each hour worked in excess of 40. Indeed, so long as the minimum hourly rate is paid, the Act does not command any wage increase over pre-statutory earnings at all. For the teaching of the *Belo* case is that "nothing in the Act bars an employer from contracting with his employees to pay them the same wages that they received previously, so long as the new rate equals or exceeds the minimum required by the Act" (316 U. S. at 630).[18] There is no prohibition

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[17] In fact, as we have noted (*supra*, p. 18), the rates set by the National War Labor Board Agreement under the Meyer formula were substantially higher than the predecessor Sloan Agreement rates recomputed under the *Missel* formula.

[18] The dissenting opinion did not take issue with this statement. Rather, the core of the disagreement in the *Belo* case was whether the hourly rate so set was a genuine rate in the light of the weekly guaranty.

against "a genuine contractual decrease in wages, based upon bargaining, individual or collective." *Watkins* v. *Hudson Coal Co.*, 151 F. (2d) 311, 319 (C. C. A. 3), certiorari denied, 327 U. S. 777. And, upon passage of the Act, an employer may legitimately shift from payment of a weekly salary for a fixed workweek in excess of the maximum hours to a new contract "based upon an hourly basis, at a rate actually somewhat in excess of the minimum provided for by the Act, but which when calculated with normal overtime would not yield more than the amount they had been receiving on the weekly basis." *Shepler* v. *Crucible Fuel Co.*, 140 F. (2d) 371, 373 (C. C. A. 3); cf. *Bergschneider* v. *Peabody Coal Co.*, 142 F. (2d) 784 (C. C. A. 7).

And, indeed, the first Administrator of the Wage and Hour Division contemplated a method of payment similar to that here involved for the specific purpose of breaking down into hourly rates, and allocating the rates between straight time and overtime, wages which had traditionally been paid on a weekly basis. For contemporaneously with the effective date of the Act, the Administrator stated:[19]

> "Clerical forces, we all feel, are included in the Act. But I cannot see where there is going to be any practical difficulty there because your clerical force in any plant of any consequence certainly is earning on a basis of more than 25 cents an hour weekly wages divided by the hours they work. If they are well above 25 cents an hour, it seems to me that there would not be much question about time and a half for overtime, *because you could figure in that weekly wage that time and a half over the 44 hours had been given consideration as remuneration for their full week's pay*" (italics supplied).

Thus, the hourly rates in this case were computed on the very basis, and in the very circumstances, suggested by the Administrator. That the master agreement itself did not

[19] Speech before the Southern States Industrial Council, Birmingham, Alabama, September 29, 1938, reported at 3 Wage and Hour Reporter 228, and cited in the *Belo* case, 316 U. S. at 630, note 6.

specify the hourly rates in dollars and cents, but simply enunciated the algebraic formula by which such rates could be computed in each case, surely cannot affect the result. For the Act is concerned with substance, not form. And liability cannot hinge on the insubstantial difference between specifying hourly rates in a single document—the master agreement (where, as we have seen, such specification would have been exceedingly cumbersome)—, or in two related and successive documents—the master agreement and the payrolls.

It is submitted that the circumstances leading to the adoption of the Meyer formula, the nature of the formula itself, and its actual use and operation establish its validity under Section 7 of the Fair Labor Standards Act.

Conclusion

For the foregoing reasons the judgment of the Circuit Court of Appeals should be reversed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 497

149 MADISON AVENUE CORP., and WILLIAMS & CO., INC.,
Petitioners,

against

FRANK ASSELTA, CAMILO DEL RIO, JOSEPH McARDLE, SAMUEL MANNE, CORNELIUS McCOLE, BURTON PETERSON, FRANK RODRIGUEZ, JAMES TORRA, JOHN H. BERGER and GEORGE BERGER,
Respondents.

MOTION OF

128 West 30th Street Corp.
Eleven Fifteen Realty Corp.
Richfil Estates, Inc.
Mangeorge Realty Corp.
Two Fifty Three Realty Corp.
Mathilda D. McCullough and Lillian Kaster
Thelma Savada, Betty Kaufman, Jean F. Ruth, Helen Rosenthal
Millinery Combination, Inc.
Hurry Realty Corp.
Seven Thirty Eight Realty Corporation
15 West 39th Street, Inc.
Manlev Realty Corp., Bernie Bernstein, Charles Rothenberg, Grace Rothenberg, David Levin, Dan W. Barker, Emanuel Schlossman, Saul Schlossman, Carl Walberg,

FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*.

MURRAY I. GURFEIN,
Counsel for the Above-named Movants, as Amici Curiae.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 497

149 MADISON AVENUE CORP., and WILLIAMS & CO., INC.,
Petitioners,

against

FRANK ASSELTA, CAMILO DEL RIO, JOSEPH MCARDLE, SAMUEL MANNE, CORNELIUS MCCOLE, BURTON PETERSON, FRANK RODRIGUEZ, JAMES TORRA, JOHN H. BERGER and GEORGE BERGER,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

MAY IT PLEASE THE COURT

The undersigned, as counsel for the movants named below, respectfully moves this Honorable Court for leave to file the accompanying brief in this case as *amici curiae*.

MURRAY I. GURFEIN,
Counsel for:

128 West 30th Street Corp.,
Eleven Fifteen Realty Corp.,
Richfil Estates, Inc.,
Mangeorge Realty Corp.,
Two Fifty Three Realty Corp.,
Mathilda D. McCullough and Lillian Kaster,
Thelma Savada, Betty Kaufman, Jean F. Ruth, Helen Rosenthal,

Millinery Combination, Inc.,
Hurry Realty Corp.,
Seven Thirty Eight Realty Corporation,
15 West 39th Street, Inc.,
Manley Realty Corp., Bernie Bernstein, Charles Rothenberg, Grace Rothenberg, David Levin, Dan W. Barkin, Emanuel Schlossman, Saul Schlossman, Carl Walberg,

Amici Curiae.

Statement of *Amicus Curiae* Position

The movants are twenty-four owners or operators of real estate in New York City. Each of them is a defendant in one or more of the following cases, all pending in the United States District Court for the Southern District of New York:

Berbeck, et al. v. *128 West 30th Street Corp., et al.* Civil No. 37-659;

Borg, etc. v. *Eleven Fifteen Realty Corp., et al.* Civil No. 38-705;

Bredstrand, etc. v. *29-35 West 32nd Street Corporation, et al.* Civil No. 39-289;

Gonzales, et al. v. *Adams & Co. Real Estate, Inc., et al.* Civil No. 36-339;

Jordan, et al. v. *New York Life Insurance Company, et al.* Civil No. 37-171;

Marino, etc. v. *Coleman Holding Corp., et al.* Civil No. 38-754;

Moore, et al. v. *Adams & Co. Real Estate, Inc., et al.* Civil No. 36-439;

Morelli, etc. v. *Coleman Holding Corp., et al.* Civil No. 39-285;

Pellittiri, et al. v. *Adams & Co. Real Estate, Inc., et al.* Civil No. 36-120;

Rennar, etc. v. *Hurry Realty Corp., et al.* Civil No. 39-526;
Richardson, etc. v. *Seven Thirty Eight Realty Corporation, et al.* Civil No. 38-756;
Sutherland, et al. v. *Adams & Co. Real Estate, Inc., et al.* Civil No. 38-356;
Walsh, et al. v. *Adams & Co. Real Estate, Inc., et al.* Civil No. 37-32;
Pyke, etc. v. *Ploger, et al.* Civil No. 39-524.

As such owners or operators they signed contracts with Local 32B of the Building Service Employees International Union on the form which emerged from the recommendation of the National War Labor Board in 1942 (Pl. Ex. 1; Pl. Ex. 4, pp. 3, 33-34, 70-72). Their contract is precisely the same as the contract, the validity of which is challenged, in the case at bar.

They and about 700 owners similarly situated understood that this agreement complied with the Fair Labor Standards Act. ~~They~~ It ~~were~~ was accepted by a strong labor union; ~~they~~ it bore the imprimatur of a government agency —the National War Labor Board. The movants participated in no negotiations, which is also true of the defendants 149 Madison Ave. Corp. and Williams & Co. in the present case. Thus, neither the movants nor the defendants in this case could have had any *actual* intent to "circumvent the statute" (C. C. A. op., R., p. 83) by the intentional manipulation of words.

The movants paid substantial wage increases at the time they signed the agreement, more than required by the application of the Fair Labor Standards Act. They in no sense preserved the pre-statutory wage scale. Payrolls were computed on an hourly basis. The Wages & Hours Administration has not hitherto challenged the formula or the modes of payment. They, nevertheless, now find that they are subjected to suits for double liability from Septem-

ber 1942 to September 1945 on agreements with which the Circuit Court of Appeals "might otherwise agree" if it were not for an "intent to circumvent the statute". Because the decision herein may be determinative of the situation of the movants, the motion has been made to file this brief as *amici curiae*.

The petitioners herein have consented in writing to the filing of this brief as *amici curiae*. The respondents have stated in writing that, while they do not consent, they do not oppose this application for permission so to file.

Respectfully submitted,

MURRAY I. GURFEIN,
Counsel for Above-named Movants.

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149 MADISON AVENUE CORP. and WILLIAMS & CO., INC.,

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FRANK ASSELTA, CAMILO DEL RIO, JOSEPH MCARDLE, SAMUEL MANNE, CORNELIUS MCCOLE, BURTON PETERSON, FRANK RODRIGUEZ, JAMES TORRA, JOHN H. BERGER and GEORGE BERGER,

Respondents.

BRIEF FOR *AMICI CURIAE*

Opinions Below

The opinion of the District Court (R. 184-203) is reported at 65 Fed. Supp. 385. The opinion of the Circuit Court of Appeals (R. pp. 81-85) is reported in 156 F. (2d) 139.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on June 17, 1946 (R. p. 84). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial

Code as amended by the Act of February 13, 1925. The petition for a writ of certiorari was filed on September 13, 1946 and granted after petition for rehearing on December 9, 1946.

Questions Presented

The master agreement was applicable to loft buildings, as well as other buildings pursuant to a Directive Order of the National War Labor Board. The parties understood that the loft buildings were to be covered by the Fair Labor Standards Act. The contract provided for a regular workweek for most building service employees of 46 hours per week, provided "minimum weekly wages" and contained a formula to determine the regular hourly rate of each employee as follows:

> "Hourly rates for those regularly employed more than 40 hours per week shall be determined by dividing their weekly earnings by the number of hours employed plus one-half the number of hours actually employed in excess of 40 hours."

The hourly rate was a constant rate. Payroll sheets were made on an hourly basis with time and a half shown for hours above 40, which the employees accepted.

The ultimate question presented is whether the hourly rates paid under the formula were the regular rates for purposes of overtime under Section 7(a) of the Fair Labor Standards Act of 1938. The subsidiary questions are:

(1) Did the agreement at bar provide for agreed weekly earnings (take home pay) inclusive of overtime compensation?

(2) Where the parties agree on a regular workweek with agreed weekly earnings (take home pay) inclusive of overtime compensation, with an hourly

rate derived therefrom, is there any legal compulsion to apply the *Missel* formula (wage divided by hours equals rate, 316 U. S. 572, 580)?

(3) Where the total compensation for a regular workweek is higher than would have been required through an application of the Fair Labor Standards Act to the previous weekly rate, has not the statutory purpose been carried out?

(4) Is there any legal difference under the Fair Labor Standards Act between an expressed hourly rate and an hourly rate derived arithmetically by the formula?

Statute Involved

The pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C. 6, Section 201, *et seq.*) are as follows:

"Sec. 7 (a). No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

* * * * * * *

(3) For a workweek longer than forty hours * * * unless such employee receives compensation for his employment in excess of the hours above specified at a rate of not less than one and one-half times the regular rate at which he is employed."

Statement

The *amici curiae* herein adopt the statement of facts in Appellants' Brief (Appellants' Brief, pp. 4, through 17), except as reference may be made to the record herein to avoid burdening the Court with repetition.

Specification of Errors

The Court below erred

(1) in holding that the hourly rates computed under the formula of the National War Labor Board Agreement were not the regular hourly rates for purposes of overtime under Section 7(a) of the act;

(2) in holding that the Respondents were entitled to overtime, liquidated damages of equal amount, attorneys' fees and costs under Section 16(b) of the Act.

Summary of Argument

The weekly minimum wages fixed in the agreement were intended to be take home pay inclusive of overtime compensation. They were not a weekly rate of pay for a variable workweek. The weekly minimum wage referred to a regular workweek with a fixed number of hours. This was not a case where a weekly wage was set with no limit imposed upon the number of hours the employee would be required to work for the weekly wage. Thus, an hourly rate for the non-overtime hours could be derived from the weekly figure.

The formula was the only mathematical method for determining such hourly rate for non-overtime hours.

Since there was, in fact, an hourly rate determined by the formula applied by the parties, the Courts below were in error in concluding that there were fixed weekly rates of compensation. The conclusion was erroneous as a matter of law. It is supported by no evidence as a matter of fact.

Under the decisions of this Court parties may by contract provide that a weekly figure include additional com-

pensation for overtime. In such case the *Missel* formula is not applicable.

That the hourly rate in this contract was derived from a weekly take home figure does not make the hourly rate any less regular than if it had been expressed. The difference is merely one of form and reaches the same result.

In this case substantial increases in take home pay were given to the building service employees in the contract at issue. The increases were more than would have been required by the imposition of a 50% premium for overtime applied to the old rate of weekly pay of the preceding Sloan Agreement. The employers have thus paid more than 150% for hours above the statutory workweek. The statutory policy has thus been fully complied with.

To prohibit the procedures of this agreement would be to limit the field of collective bargaining. Take home pay is often the primary union consideration, and a fixed workweek above the statutory workweek is of benefit to the employees.

ARGUMENT

The Hourly Rates under the Formula of the Agreement were the "Regular Rates" under Section 7 of the Fair Labor Standards Act.

A. The weekly minimum wage in the agreement was "take home pay" inclusive of overtime for a regular workweek and not a weekly rate of pay for a variable workweek. This interpretation is compelled by the formula for hourly rate and by the course of dealing of the parties.

The National War Labor Board Agreement referred to both a "weekly minimum wage" for a regular workweek, and to a formula for determining the *hourly* rate (Pl.

Ex. 1). The formula read:

> "The hourly rates for those regularly employed more than forty (40) hours per week shall be determined by dividing their weekly earnings by the number of hours employed plus one-half of the number of hours actually employed in excess of forty (40) hours."

The hourly rate was a *constant* rate determined by the formula on the basis of a regular workweek. The weekly figure was an index of reference for the hourly rate to be derived by formula. It was a figure that included the overtime properly compensated within the regular workweek. It was never a weekly rate of pay for a workweek of varying length nor was it a weekly rate of pay for a regular workweek *exclusive* of overtime. That it was at all times referable to an hourly rate is demonstrable in this case.

No weekly figure was arrived at in this case without *simultaneous* agreement upon the *hourly* rate to be fixed by formula. This can be demonstrated with mathematical precision. *Before* the National War Labor Board hearings there had been no agreement between the parties as to wages or hours. During the National War Labor Board hearings there was discussion of the formula (already contained in the *Meyer* Agreement in the same industry), *before* any recommendation had been made by the Panel (Pl. Ex. 4, pp. 33-34). When the Panel recommended the weekly figure, it was not yet the subject of an agreement of the parties—no meeting of the minds on wages had yet occurred. The Panel specifically said so in langauge the lower courts failed to quote:

> "It was understood *at the hearing* that if the Board set hours for offices and lofts above the 40-hour maximum demanded by the union, the parties would adopt the formulae of the Meyer Agreement for the calcu-

lation of hourly rates, and the fixing of overtime. These formulae were introduced because of the prospective application of the Fair Labor Standards Act. We quote and explain them in Appendix B. As they have been accepted in principle by the parties we believe they should be incorporated into the present contract" (Pl. Ex. 4, pp. 33-34). (Italics ours.)

The language makes it explicit that hourly rates *were* to be calculated and *overtime was to be fixed* with reference to the Fair Labor Standards Act. The weekly figure could not and did not become the subject of *contract* until *after* the Panel recommendation. In fact, the Panel made its recommendation on July 17, 1942, and the Directive Order of the National War Labor Board adopting it was made on July 29, 1942. The agreement in suit was not signed until September 1, 1942. It was signed with a *simultaneous* acceptance of the weekly figure and of the formula hourly rate.

This procedure could have had no meaning unless it meant that the weekly figure (*the only weekly figure ever agreed upon*) was actually intended to include overtime compensation. This conclusion is fortified in various ways: *First*, the formula exactly describes the arithmetical fact that where you have compensation *inclusive* of overtime the way to determine the regular non-overtime hourly rate is by dividing the total compensation by the number of hours employed plus one-half the hours employed above the non-overtime workweek. It is an arithmetical way of saying that the weekly figure *includes* overtime compensation. The employment of the formula makes the intent as clear as if the phrase "inclusive of overtime compensation" had been written in.

Second, the Directive Order of the National War Labor Board ordered wage increases on the ground that "they are justified by the rise in the cost of living since January 1, 1941, and by the need to remove the recently

created inequalities between the wage scales in the garment center buildings (the Meyer Agreement) and those here involved"—(Pl. Ex. 4, pp. 3, 16-17, 33-34; 70-72)*. So far as the cost of living increase was concerned that was obviously measured by take home pay. So far as adjustment to the Meyer Agreement was concerned, that agreement already contained the very formula in issue, and hence, was understood in its "weekly wages" to mean "take home pay". The determination of what the employees in our case should get weekly was based on the *knowledge* that the employees under the *Meyer* Agreement were not getting more than that *to take home;*—in simple terms, that the Meyer weekly figure was inclusive of overtime. It is with that concept, then, that the weekly wages awarded by the Board must be compared.

Third, the parties understood that the Fair Labor Standards Act applied to their contract. *Kirschbaum* v. *Walling,* 316 U. S. 517 (decided June 1, 1942) and *Overnight Motor Co.* v. *Missel,* 316 U. S. 572 (decided June 8, 1942) had both been decided.** They knew that, if they referred to a weekly figure, they would have to adopt either a weekly rate which would have overtime compensation imposed by the *Missel* formula, or a weekly wage, including overtime.

Fourth, the formula itself describes the weekly sum as "weekly *earnings,*" not "weekly rate."

Fifth, the Panel of the National War Labor Board and the full Board approved the formula and cannot be presumed to have concurred in an illegal act. The language

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* The Meyer agreement contained the same formula for determining hourly rates, and the minimum weekly figures.

** The Second Circuit Court of Appeals decision in *Fleming* v. *Arsenal Bldg. Corporation,* 125 F. (2d) 278 (C. C. A. 2), decided December 30, 1941, was affirmed in the *Kirschbaum* case. The Fourth Circuit Court of Appeals decision in the *Missel* case, 126 F. (2d) 98, decided January 5, 1942, was affirmed.

of its explanation of the formula in Appendix B to Plaintiffs' Exhibit 4 is poor, but what emerges is that the Panel understood that the weekly figure was intended to be inclusive of overtime compensation under the Act, and that the rate for the non-overtime workweek was as clearly derivable from the formula as if it had been expressed. When the Panel speaks of this method as being in lieu of computation in the "ordinary way" it means precisely what we urge—that the weekly figure was not a "rate" of pay exclusive of overtime and that, therefore, computation in the "ordinary way" was inapplicable.

The Panel statement showed that (1) the parties had known they would adopt the formula *before* they had adopted any weekly figure and (2) that the hourly rate was not to be computed in the "ordinary way"—*because* the weekly figure was intended to include overtime compensation. In that case, the *only* way to determine the hourly non-overtime rate is by the very formula herein inserted.

B. *The courts below erred in ruling that there was a fixed weekly wage by agreement.*

The District Judge found that "plaintiffs were employed by the defendants at fixed weekly *rates* of compensation" (R. 170; italics ours). From this he concluded that "having fixed a weekly wage by agreement, the determination of the regular rate became 'a matter of mathematical computation, the result of which is unaffected by any designation of a contrary regular rate in the wage contracts.'" He, therefore, ruled that the hourly rate could only be determined under the *Missel* formula (316 U. S. 572): hourly rate equals weekly wages divided by weekly hours (R. 198-199).

His error was pervading, as we shall see, for there was no reference to weekly "rate" in the agreement,

and there was no competent evidence dehors the agreement to support the finding. The Second Circuit Court of Appeals affirmed.

If the ruling was one of law, it was wrong because: (1) the only logical inferences from the Agreement, as we have seen, were to the contrary (*supra*, pp. 10-13); (2) it assumed—the very question at issue—that a weekly figure inclusive of overtime compensation could not be the basis for the derivation of an hourly rate even where the number of hours in the workweek was fixed. (See Subpoint C.)

If we treat the ultimate findings (F. F. 15, 18, 19; R. 170-172) as true findings of fact there is no evidence to support them.

First, there was no oral testimony whatever on the subject—not one word.*

Secondly, the only exhibits, in addition to the agreement itself (Pl. Ex. 1) and the earlier Sloan agreement (Pl. Ex. 3) were two stipulations of fact between counsel (Pl. Ex. 2 and Defs. Ex. B), and the National War Labor Board's Directive Order (Pl. Ex. 4), plus the weekly pay roll records for the period April 20, 1942 to December 10, 1943 (Pl. Ex. 6).**

There is nothing in any of these documents to lend the slightest support to the view that plaintiffs were employed at fixed weekly rates of compensation.

An analysis of the Exhibits shows:

(a) The first stipulation (Pl. Ex. 2) recites:

> 1. That plaintiffs (except for Berger and Rodriguez) "were employed and paid in accordance with

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* The asterisks in the record refer to omitted testimony on entirely different subjects (R. 108-114).

** Pl. Ex. 5 were computations for an earlier period, not relevant in this Court.

> the terms and conditions of employment provided in a collective bargaining agreement known as the N.W.L.B. agreement."

The essence of the agreement was the provision for *hourly* rates to be paid pursuant to the formula. That is the apparent meaning of the stipulation as well, when it speaks of the "terms of employment." In fact, it was stipulated that the employees were actually "employed and paid" under the terms and conditions of the agreement.

If the District Court used "fixed weekly rates" as a word of art, there is no reference to support it in either the agreement or the stipulation.

It was further stipulated:

> "5. That said plaintiffs * * * were employed and actually worked pursuant to the terms of said NWLB agreement during the periods specified below on the following basis:" Then follows a table with these headings: "(1) Plaintiff's name; (2) Period; (3) Total hours regularly employed per week; (4) Weekly wages *or* earnings; (5) Number of regular workweeks in Periods."* (Italics ours.)

The significant heading is "4": "Weekly Wages or Earnings."

This heading can only mean that the parties understood that there was no difference between "wages" and "earnings" and hence, that the weekly figures were "earnings".**

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* Paragraph 5 of Pl. Ex. 2 was amended in Defs. Ex. B, Par. 4 but only as to the figures—not the language or the headings. Def. Ex. B, Par. 7 incidentally refers to the amended figures as "weekly earnings."

** Significantly for the periods *prior* to the National War Labor Board agreement, the heading is simply "weekly wages" (R. 129-132).

(Continued on following page)

If the weekly figure were "earnings", they included compensation for overtime hours.‡

3. Paragraph 10 of Plaintiffs' Exhibit 2 attaches as Exhibit A thereto a typical payroll.

The Court will observe that the payroll showed *hourly* rates with time and one half for all hours above 40.

This is certainly no evidence of a fixed weekly rate of pay.‡‡ On the contrary, it shows an acceptance of the hourly method of payment, with 150% for hours above 40.

(b) The second stipulation (Defs. Ex. B; R. 139-159) deals with actual modes of payment and is no evidence whatever of a fixed weekly rate of pay.

Thus, up to this point, *there is literally no evidence to support the District Court's finding.*

(~~*Continued from preceding page*~~)

‡ We respectfully ask the Court to note that Paragraph 7 of the stipulation (Pl. Ex. 2, R. 127) applied only to two non-union plaintiffs and has no reference to the other plaintiffs or to the National War Labor Board agreement.

We call to the Court's attention that plaintiffs' counsel has adroitly sought to restate the stipulation *without argument or explanation*, as providing "That each plaintiff received a flat weekly wage for a fixed workweek whose hours substantially exceeded the statutory maximum" (Brief in opposition to certiorari, p. 7). There is no support for such a statement. It is misleading and unwarranted.

‡‡ Respondents rely on certain minor discrepancies found in some items on these payrolls to argue that the hourly rate was not applied. The Circuit Court of Appeals seems to have adopted their reasoning.

The answers are several: (1) The doctrine of *de minimis* was never more applicable, since the bookkeepers simply failed to carry out the hourly rate to four decimals. (2) The laziness or error of particular bookkeepers can hardly determine intention in this vast matter. (3) The errors were not calculated or intentional, for the employers gained nothing from them. (4) The fixing by contract of a weekly figure inclusive of overtime pay, should in any event, be sufficient for compliance, where the workweek is regular.

The only other "evidence" in the record, as we have seen, is the National War Labor Board's Directive Order (Pl. Ex. 4). Attached to the Directive Order is the Recommendation of the Mediation Panel to the National War Labor Board. Attached to the recommendation is an Appendix B. This Appendix B purports to discuss the formula.* In its discussion there are two sentences, picked out by Judge BONDY, and adopted as his findings (F. F. 15, 18, 19; R. 170-172). The same sentences were picked from Judge BONDY's findings by the Circuit Court of Appeals as the basis of its decision. The sentences are: This formula was "designed to offset the full overtime costs which would ensue if hourly rates were computed in the ordinary way"; and its purpose was "to reduce the hourly rate sufficiently so the payment of time and a half for overtime† * * * will not bring the total weekly earnings substantially above the weekly rates set by the agreement" (Opinion of Judge BONDY, R. 197; Opinion of Circuit Court of Appeals, R. p. 83). The last phrase is the only place in the record where we have been able to find the term "weekly rates." It would seem that *on this phrase alone* Judge BONDY based his finding that plaintiffs were employed at "fixed weekly rates of compensation."‡

This we believe was basic error: (a) It overemphasized the specific language of the Panel; (b) it misconstrued what the panel meant, as evidenced by their entire report.

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* As we have seen, *supra* pp. 10-11, there is a clearer statement in the text of the recommendation at pp. 33-34, which the courts below apparently overlooked.

† The District Court here omitted "for the last 6 hours" which was significant language in two respects: (1) it states that overtime was to be paid for *these* 6 hours (from 40 to 46) and (2) it underlines that this was a regular workweek problem.

‡ The District Court could not have based his finding on any determination that hourly rates were not applied for he accepted "the fact that defendants here actually applied in all situations the hourly rates so derived" (R. 200).

(a) The language of the Panel was certainly not binding on the *parties*. They had no part in writing it and it may have entirely misconstrued their intention. It certainly was not binding on the appellants herein who merely adopted the standard contract and were not before the National War Labor Board at all. In the absence of confrontation and cross-examination of its anonymous author the particular nuance of language may have been wholly haphazard. A whole industry may thus be in peril of double liability, with the question left unresolved of whether the anonymous author of Appendix B knew what he was writing in the light of the issue now presented and whether he chose his words with carelessness or caution. Justice can hardly tip the scales with so light a feather.

(b) A clearer expression appears in the language of pages 33 and 34 of the Recommendation of the Panel—(Pl. Ex. 4) quoted above at pages 10-11. It is clear that the Panel was writing of a fixed workweek and when it emphasized the payment of time and a half for overtime *for the last six hours* (Pl. Ex. 4, p. 70) it meant that overtime was actually to be paid for those hours, which were the hours above forty. It is thus manifest that when the Panel spoke of "weekly rates" it did not intend the phrase to be a word of art—but simply to emphasize that the weekly figure was to include overtime compensation as explained by it. If the language of the Panel is "evidence" of an intent to circumvent the statute, it makes the National War Labor Board a party to such "circumvention". There is nothing to indicate it intended or anticipated any such result.

The Panel recommendation, moreover, upon which the lower courts laid such entire stress, antedated the agreement itself. Clear it must be that the meeting of the minds of the parties on the principle of the formula, *i.e.* hourly rates, preceded the award of the Board. The Panel said

so directly (Pl. Ex. 4, pp. 33-34). Clear it is too, that the weekly figure was never agreed on without the formula—for the first possible agreement to the Labor Board's award must have been *after* the Board's Directive Order. By that time, the hourly rate was at least as integral a part of the contract as the weekly figure. What the parties accepted was the weekly figure and the hourly rate *at the same time*. To test the correctness of our conclusion we pose the question: At what point of time was a weekly rate fixed, before inclusion of the formula? We submit there never was any such point of time.

In those circumstances there was no weekly rate of pay agreed to, upon which was superimposed an hourly rate. The weekly figure, in the situation here presented, simply could not mean anything other than "take home pay inclusive of overtime compensation." In those circumstances, the only "regular rates" were constant hourly rates, determined by application of the formula.

This Court said recently:

> "The conclusiveness of the 'finding of fact' depends upon the nature of the materials on which the finding is based. * * * Finding so-called ultimate 'facts' more clearly implies the application of standards of law. And so the 'finding of fact' even if made by two Courts may go beyond the determination that should not be set aside here. Though labelled 'finding of fact' it may involve the very basis on which judgment of fallible evidence may be made."

Baumgartner v. *United States*, 322 U. S. 665, 671 (1944); see *Beyer* v. *LeFevre*, 186 U. S. 114, 119 (1901).

We have seen that the "nature of the materials on which the finding is based" in this case is the lowest category of legal proof—a play on words in the Report

of the Panel which does not even carry out its obvious meaning. We have seen that the "foundation for the findings" (322 U. S. at 670) is this "evidence" alone. Nor was there any judgment of the credibility of witnesses by the trial court to which due regard should be given. Indeed, the use of the precise language of the Panel Recommendation to support the finding was nothing more than an exercise in semantics.

We respectfully submit that this is a case where the "foundation for the findings" crumbles on inspection. Even if the fundamental error should be held not to be solely one of law, the error in the findings was that kind of "clear error" upon which, in the interests of justice—and perhaps also because there are so many other defendants who have never had their day in court—this Court should reverse.

C. Under the decisions of this Court parties may by contract provide that a weekly figure include additional compensation for overtime. In such case, the Missel formula is inapplicable.

The formula did provide an hourly rate which we are told is unrealistic and artificial because derived from a weekly figure (R. 198-200). That might be so, if the weekly figure were a weekly rate of pay fixed by agreement, regardless of overtime—and for a workweek without fixed hours. For the *Missel* case tells us that, in such case, the regular rate is normally derived by dividing the weekly rate by the number of hours worked. But the *Missel* case did not purport to say that the same result would be reached if the weekly figure, instead of being a weekly rate of pay, were a figure of weekly earnings *inclusive* of overtime pay for a fixed number of hours. For in such case, the figure to be divided by the number

of hours worked *could not,* arithmetically, give a regular rate upon which overtime pay could be imposed without imposing overtime pay on overtime pay.

This Court has not overlooked the logic of the situation. In *Warren-Bradshaw Co.* v. *Hall,* 317 U. S. 88, 93, the Court, in expounding the *Missel* doctrine emphasized the point when it said that in the case there under consideration: "There was no *agreement* providing for an hourly rate of pay *or that the weekly salary include additional compensation for overtime hours.*" (Italics ours.) We take the latter phrase to mean that if there had been such an "agreement" the *Missel* formula would not have applied.

The alternatives thus stated were the alternatives to take the case out of the *Missel* formula. As we have shown, we are covered by both alternatives. Our contract did provide an hourly rate of pay. It also, as we have shown, had the "weekly salary include additional compensation." And the payrolls herein were computed on an hourly basis (Pl. Ex. 6).

That such was the logic of the *Missel* case itself is clear, for the Court there refused to *infer* that the weekly rate of pay was intended to include overtime pay. It refused to mend the contract by "implication." Yet, it would have been unnecessary to rebut the inference had it been irrelevant. In the instant case, the question is, therefore, merely whether the parties to the agreement intended to make the weekly earnings figure inclusive of overtime compensation. (See pp. 10-13, *supra.*)

In the *Missel* case itself the contract *could not* be mended by "implication" because there was no fixed workweek, as here. The Court there said:

> "But there was no contractual limit upon the hours which petitioner could have required respondent to

> work for the agreed wage, * * * and no provision for additional pay in the event the hours worked required minimum compensation greater than the fixed wage" (316 U. S. at 581).*

We submit that the emphasis in the *Missel* case on the fact that there was no contractual limit upon the hours to be worked for the agreed wage means that when there is a regular workweek with fixed hours, there may be a weekly figure that *does* include overtime. The language in *Warren-Bradshaw*, quoted *supra*—"or that the weekly salary include additional compensation" (317 U. S. at 93), confirms this view.

It is unnecessary, therefore, to rely upon *Walling* v. *Belo Corp.*, 316 U. S. 624 (1942) although that case supports affirmance in this case. Our case is *a fortiori* to the *Belo* case. For there the weekly income was guaranteed regardless of the number of hours worked up to 54½ hours per week. In the case at bar the weekly wage was not guaranteed and the fixed hourly rate would bring fluctuations in weekly earnings if the employee worked less or more than 46 hours. The *Belo* case clearly supports the proposition that a contract which provides both a weekly wage and an hourly rate need not be illegal because of inconsistency. It may be noted that the dissent in the *Belo* case relied strongly on the argument that the *Belo* contracts were "for weekly wages for variable

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* This is a clear point of distinction from a case like *Walling* v. *Stone*, 131 F. (2d) 461 (C. C. A. 7, 1942). There the employment was at fixed weekly wages "irrespective of the hours worked" (131 F. (2d) at 462). The Court was, therefore, clearly right, on the facts before it. If the decision meant that in no circumstances could there be an agreement for a wage to include statutory overtime pay, it is contrary to the language of *Warren-Bradshaw Co.* v. *Hall*, *supra*.

hours" (316 U. S. at 637). There is no such difficulty in our case.

Three other cases, in addition to the *Missel* case are cited to support the decision below: *Walling* v. *Harnischfeger Corp.*, 325 U. S. 427, *Walling* v. *Hardwood Co.*, 325 U. S. 419, and *Walling* v. *Helmerich & Payne*, 323 U. S. 37.

(1) In the *Harnischfeger* case, 98.5% of the incentive employees received incentive bonuses in addition to their guaranteed hourly wages, demonstrating that such bonuses were a normal and regular part of their income. The court held that the parties could not disregard the total earnings *within the statutory workweek* in computing the regular hourly rate. The true wages were held to include the incentive bonuses.

(2) In the *Hardwood* case the same doctrine was applied, except there the guaranteed piece goods rate was the real rate. In our case, we have no problem of incentive bonuses or piece work rates.

(3) The *Helmerich & Payne* case seems more difficult because of some of the language in the opinion. But upon analysis it is no precedent for affirmance.

First, there was a clear intention to perpetuate the "pre-statutory wage scale".* Indeed, this court described that as the "sole purpose" of the plan (323 U. S. at 41). The

* The Court below in the *Helmerich & Payne* case (138 F. (2d) 705, 706 (C. C. A. 10, 1943)), said: "The company concedes that the real purpose in entering into the contracts was to continue paying the employees the *same amounts per week* in the aggregate as they had been paid before the act became effective, and at the same time to comply with the act." (Italics ours.)

wages under the old system and under the split-day plan were *identical* (323 U. S. at 39). The plan was created in order to maintain the *same* wage levels after the Act became effective (323 U. S. at p. 38). In the case at bar, there was no attempt to perpetuate the pre-statutory wage scale. The take home pay under our contract was higher than the take home pay under the preceding Sloan agreement. (See Subpoint E, pp. 30-33, *infra.*)*

Second, there was an arbitrary division of each workday to accomplish the purpose so that the expressed hourly rate failed to reflect the first 40 hours of work ("the normal, non-overtime week") as required under the Act.

Third, there was no fixed workweek and the hourly rate was so constructed that on the basis of a 12-hour day there could be no extra compensation except after 84 hours.

Fourth, there was no provision, such as here for including overtime in a fixed weekly figure for a regular workweek.

We believe that there has been no case in this Court which has determined the precise problem of a *regular* workweek, where by contract the parties intend to provide for overtime to be included in a weekly figure.

We respectfully submit that there is nothing in the Fair Labor Standards Act or in the realities of the collective bargaining situation to prohibit the fixing of weekly compensation to include overtime, where a regular workweek is stipulated.

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* We recognize that in *Watkins* v. *Hudson Coal Co.*, 151 F. (2d) 311 (C. C. A. 3, 1945), cert. den. 327 U. S. 777 (on another point) there was an increase in pay which appears not to have been considered relevant. With deference, we think the Third Circuit Court of Appeals failed to consider how anomalous is a doctrine which conceding that an increase has been agreed upon beyond the penalty requirements of the Fair Labor Standards Act, nevertheless condemns a rate based thereon as artificial.

As with all methods of compliance with the Fair Labor Standards Act the courts will look to the realities. If there was a weekly rate of pay agreed upon, exclusive of overtime with no fixed hours, the addition of a formula might not be enough to prevent the application of the *Missel* doctrine. But where the parties bargain throughout for a fixed workweek with the formula in mind, there is at no point of time a contract for a weekly rate exclusive of overtime; the *original* contract includes the overtime compensation in the weekly figure. And that is just what this Court has intimated would be valid. (Cf. *Warren-Bradshaw Co.* v. *Hall, supra; Overnight Motor Co.* v. *Missel, supra*).

To be sure, the use of a weekly figure to include overtime compensation, might, in certain cases, offend the spirit of the statute. That might be so where the purpose is to preserve the prestatutory wage scale and maintain the same *take home wage.* In the light of the *Helmerich & Payne* case (*supra,* p. 23) we assume that the rationale of that decision would permit the court to determine whether the purpose was to perpetuate the pre-statutory wage scale.

In the case at bar, there are no such obstacles.

First, there was no attempt here to perpetuate the prestatutory wage scale, for the new contract involved substantial increases over the old contract.

Second, the agreement was made with a strong, *bona fide* labor union which presumptively takes care of its members and does not lightly waive their rights. The presumption is that the union officials understood that the agreement was not a subterfuge to circumvent the statute.*

* We recognize that the mere fact that the agreement was the result of collective bargaining is not enough to save it if it is not in compliance with the Act. But where *intention* is involved, as here, the *bona fides* of the labor union cannot lightly be disregarded.

Third, the contract, in all its terms, was approved in advance by the National War Labor Board. Presumptively, a government agency would not approve a contract intended to circumvent a federal statute. See *United States* v. *Crusell*, 14 Wall. 1, 4 (1871); see *Evans* v. *Berry*, 262 N. Y. 61, 72 (1933).

By every canon of judgment, we submit the National War Labor Board agreement meets the test of good faith. For the parties could have reached precisely the same result by expressing the hourly rate instead of using the formula. That was apparently not done for two reasons: (1) the industry was not accustomed to dealing in hourly rates and a specific hourly rate would have had little meaning for the employees; and (2) there were so many categories of employees that long schedules of hourly rates would have been required. This was particularly true because compensation varied by seniority in individual buildings, and a properly expressed hourly rate would have required hundreds of separate calculations. The problem was not the usual one of flat rates for large categories of employees in industrial plants. It is for this reason that the weekly compensation had to be stated in terms of "minimum wages" (inclusive of overtime pay).

D. *The formula hourly rate is not different in law from an expressed hourly rate. The reasoning of the Circuit Court of Appeals leads to unrealistic distinctions.*

In the absence of the language of the Panel Recommendation, the Circuit Court of Appeals intimated that the formula method of computing an hourly rate might be as valid as an hourly rate "expressly stated."

We suggest that is clear. Practical considerations make it evident. To distinguish between an hourly rate expressed and an hourly rate derived, provided it is not

artificial, would be to put form above substance. In industries where before the statute a *weekly* rate was prevalent, the fixing of a regular hourly rate is often difficult because neither side is accustomed to think in those terms. Where in such industries there is the complicating factor of a workweek longer than the statutory workweek the factor of "take home pay" becomes, in realistic terms important. For whether the rate is, as an initial matter, fixed at an hourly rate or at a weekly rate, the figures will often not result in the take home pay the employees desire unless they are given work for more than 40 hours. Yet, unless there is a regular workweek of more than 40 hours defined in the contract there is no way of assuring to the workers the take home pay they want.*

This brings us to a practical dilemma. The employee wants to know how much he will take home in his pay envelope each week. That is the primary concern of the union representative. If he can get a high enough rate for 40 hours of work, there is no problem, to be sure. But if by collective bargaining, which is give and take, he *cannot* obtain a high enough rate for 40 hours he must bargain for a regular workweek that will insure sufficient take home pay. When they get to that stage of negotiation, the parties will, in practice, determine an hourly rate by contract which will, with time and a half superimposed by the Fair Labor Standards Act, give a take home pay sufficiently large. In realistic terms, the parties bargain backwards in such case. Each side will have

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* That this was the concern of the union here is made clear by the provisions of the contract that the regular working hours may not be reduced by the employer in order to effect a corresponding reduction in pay. Naturally, the union desideratum was a 40 hour week with high enough take home pay. But if that is not possible of attainment, as was the case here under the NWLB award, then the union must protect the take home pay even to the point of insisting on longer hours.

a scratch pad on which he will note the take home pay figure and figure back to an hourly rate, with time and a half superimposed. To say they should not do this would be to interdict the normal procedures of men at a bargaining table. It would be much like telling a business man that he can figure only gross profit but that he may not legally compute his net.

Assuming then that an hourly rate is thus arrived at by the scratch pad device *before the contract is agreed upon,* the hourly rate will become the contract rate and clearly be in compliance with the Act, if time and one half is paid upon it for hours above 40.

Suppose now the parties, with the same end in view, articulate their arithmetical results by marking the process, not on scratch pads hidden from each other's view, but on the tablet that becomes the contract. The net result should be the same.

That is what the parties did here, perhaps in a naive belief that open expression can be no less dangerous than clandestine mathematical computation. And that is what the Circuit Court of Appeals seems to have thought illegal.‡

The Circuit Court of Appeals concluded that "the result was employment at whatever regular workweek and at whatever regular weekly wage the parties saw fit to agree upon *which remained constant* regardless of work in excess of forty hours per week which was not in excess of the number of hours in the agreed workweek" (R. p. 83). (Italics ours.)

There is no showing in this record that an employee working under forty-six hours would receive the weekly

‡ The C. C. A. indeed seemed to acknowledge that there was no difference between an expressly stated hourly rate and the formula rate (R. p. 83): "In the absence of any attempt to circumvent the statute we might agree."

wage referred to in the contract. The formula is to the contrary, for it fixed a specific hourly rate which would result in less earnings than the weekly wage of the contract if hours between forty and forty-six were worked.

The Court then characterizes the effect of the present contract as "an illusion of overtime pay after a forty hour workweek where there can be no increase in pay per workweek because of overtime work unless there is overtime not only in excess of the statutory workweek but also in excess of the agreed workweek". This again repeats the erroneous assumption that no overtime pay based on an hourly rate would be paid for hours above forty. That is not supported in the record.

But if the vice lay in the fact that normally the employee would work forty-six hours and receive the same amount each week, then the reasoning of the court below is unrealistic. For, by the laws of arithmetic, the total wage, including overtime compensation, will always "remain constant" when the same number of hours is worked regularly. Thus, if there is a regular 46-hour week, the total wage will "remain constant" each week, whether the regular rate be an expressed hourly rate, a derived hourly rate, or an hourly rate determined by the *Missel* formula. Indeed, if the 46 hours are worked each week, the same result will follow whether the length of the workweek is expressed in the contract or not.

And since it is clear that the Fair Labor Standards Act does not prohibit a workweek longer than the statutory workweek, the Circuit Court of Appeals could hardly have meant that, in no case, could a regular workweek longer than the statutory workweek be fixed. If a workweek longer than the statutory workweek can be agreed upon by employer and employee, must it take any particular form? If we assume an agreement for a forty-six hour week and an intention to comply with the Act, an expressed hourly rate would certainly be valid, for, by

hypothesis, it would refer only to the statutory workweek, and be automatically increased by 50% for all hours above forty. Indeed, the Circuit Court of Appeals assumed its validity, *even though a workweek in excess of the statutory workweek was fixed,* as here, when it said "In the absence of any attempt to circumvent the statute we might agree" (R. p. 83).

If then, the expressed hourly rate, is, in such circumstances valid, why should the formula hourly rate not be? As we have seen, the circumstance that the result would "remain constant" in the case of a regular workweek, is no bar, for that would be just as true of the expressed hourly rate.

The upshot is: there can be no objection to the formula hourly rate except on the assumption that the weekly figure was a weekly rate of pay, exclusive of overtime pay—and with no fixed hours. If, as we have demonstrated with almost mathematical precision, there never was a weekly rate exclusive of overtime pay in this agreement,—and since the hours were fixed—there can be nothing vicious about the formula hourly rate. It must be as valid as an expressed hourly rate—and it will award overtime compensation for all hours above the statutory workweek the same as an expressed hourly rate.

E. The take home pay is higher under the National War Labor Board contract than the take home pay under the preceding Sloan agreement, even with the additional compensation required by the Fair Labor Standards Act under the Sloan agreement. The employers have already been penalized more than the 150% for hours above the statutory workweek. In these circumstances, the statutory policy has been fully complied with.

(1) *In terms of take home pay* (the ultimate objective of the Fair Labor Standards Act):

The Sloan agreement (Pl. Ex. 3) preceded the National War Labor Board contract. It was signed on July 7, 1939,

before the Fair Labor Standards Act had been held to apply to building service employees (*Kirschbaum* v. *Walling*, 316 U. S. 517, decided June 1, 1942). It provided for flat weekly wages for workweeks longer than the statutory workweek. The relevant test of intent "to negate the statutory purpose" (*Cf. Walling* v. *Helmerich & Payne*, 323 U. S. 37, *supra* at p. 18) would be an arrangement under which the total wage, including overtime compensation, would perpetuate the old total wage. There was no such subterfuge in this case.

This is demonstrated by the following comparison on a weekly basis of the take home pay applicable to loft buildings under the Sloan Agreement and under the National War Labor Board contract (Pl. Ex. 3; Pl. Ex. 4, p. 31):

TABLE 1

	Sloan Agreement			*NWLB Agreement*		
	"A" Bldgs.	*"B" Bldgs.*	*"C" Bldgs.*	*"A" Bldgs.*	*"B" Bldgs.*	*"C" Bldgs.*
Elevator Starters	$29.75	$27.75	$26.00	$33.08	$31.15	$28.50
Assist. Elevator Starters	28.00	26.75	26.00	31.33	30.15	28.50
Handymen	31.00	28.00	27.00	34.33	31.40	29.50
Other Employees	27.75	25.75	25.00	31.08	29.15	27.50

(2) *Applying the Fair Labor Standards Act to the Sloan Agreement:* To arrive at a comparable figure under the Sloan agreement, *with the Fair Labor Standards Act applied thereto,* reduce the flat weekly wage by 1/47, to allow for the reduction of one hour per week, and then apply the overtime premium for the last 6 hours on the basis of a 46-hour week:

TABLE 2

	Sloan Agreement			*National War Labor Board Agreement*		
	"A" Bldgs.	*"B" Bldgs.*	*"C" Bldgs.*	*"A" Bldgs.*	*"B" Bldgs.*	*"C" Bldgs.*
Elevator Starters	31.01	28.93	27.11	33.08	31.15	28.50
Assistant Elevator Starters	29.19	27.78	27.11	31.33	30.15	28.50
Handymen	32.28	29.19	28.15	34.33	31.40	29.50
Other Employees	28.93	26.84	26.06	31.08	29.15	27.50

Thus, the percentage of increase required under the Fair Labor Standards Act as applied to the Sloan agreement was slightly over four per cent.* In fact, the increases in take home pay under the National War Labor Board agreement *actually* ranged from 10 to 13% in "A" and "B" buildings to 9 to 10% in "C" buildings.**

By any test, the actual wages paid penalized the employers *more* than the 150% for overtime hours required by the statute. The question that remains is extremely narrow. Does the form of this contract so far vitiate the substance that despite the realities of the situation the employers must, nevertheless, again be penalized—and at this time with the addition of liquidated damages and counsel fees?

We cannot help respectfully noting that the Circuit Court of Appeals may have inadvertently misstated the facts in this regard. It wrote:

> "In making the employment contract of September 1, 1942 the parties did not see fit to agree upon the

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* These percentages may be computed by comparison of Table 1 with Table 2, Sloan agreement figures throughout.

** These percentages are based on actual take home pay increases in Table 1.

basis of a designated regular hourly rate of pay for a statutory workweek expressed simply in dollars or cents, but retained the previous workweek in excess of forty hours *and the previous weekly wage which the appellees had been paid* * * *" (R. p. 82) (Italics ours.)

It is possible that the Circuit Court of Appeals was there assuming that the weekly wage *had not been increased.* If that was its meaning, it erred on the fact. It may, therefore, have failed to consider the reality of the situation, that the employer had already been penalized more than the 150% required by the agreed increase in "take-home pay."

F. Realism requires that the agreement formula herein be sustained. Otherwise, collective bargaining will be hampered. No statutory purpose supports affirmance in this case.

Since the employers here paid more than the statutory premium, the only consideration that can be raised against them is an objection of form rather than substance. For it will be freely conceded that if the form of the contract had been different there could have been no complaint as to the result. To put it bluntly: if part of the increase given had been more clearly marked as the beneficent result of the statute rather than of the activity of the union, all would have been well. Respondents' complaint, as we understood their argument below, is that the union might have obtained more if it had clearly marked the delineation of statute and bargaining. But that is an assumption contrary to the facts. For it was the National War Labor Board that determined the amount of the award, and that agency considered the application of the Fair Labor Standards Act in its determination. If what respondents mean is that a clearer demarcation would have meant refusal of

the award by the rank and file—a strike—they have merely pointed up the argument of policy.*

The danger of a strike in vertical transportation in New York City by elevator operators in loft buildings is always a serious matter for the entire nation. In wartime such a strike would have been disastrous. Both parties to the dispute commendably agreed to the compromise increase in take home pay—under the Directive Order of the National War Labor Board. To prohibit such procedures in collective bargaining by narrow construction of the Fair Labor Standards Act would be to limit the field of compromise. The employees in this case received a fair increase in take home pay, after full consideration by their representatives of the impact of the Fair Labor Standards Act upon their industry, under the then recent rulings by this court that these employees were in interstate commerce. If economically, all there was in the picture was a limited increase (as the National War Labor Board found),—to compel part of that increase to be ascribed solely to the operations of the Fair Labor Standards Act and not to union activity would be to harm the union in its maintenance of membership and render a disservice to the cause of collective bargaining. Union representatives sometimes need the gift of statesmanship as well as of hard bargaining. It does the policy of the collective bargaining statutes no good to limit the field of action of union representatives with reference to the Fair Labor Standards Act. We have previously touched on the problem of ensuring take home pay as a prime union consideration. In addition, the good faith of the bargaining process is seriously jeopardized when latent technical objections are validated although the contract has been accepted, in good faith, by all concerned as the final word of the bargain and as full compliance with the Act.

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* Respondents are guessing, of course, when they imply now what the union members might have done then. There is nothing in the record to support any such inference—or that the moneys now claimed are anything but a windfall.

CONCLUSION

THE JUDGMENT OF THE COURT BELOW SHOULD BE REVERSED.

Respectfully submitted,

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CHRISTOPHER J. TAYLOR,
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No. 497

In the Supreme Court of the United States

OCTOBER TERM, 1946

149 MADISON AVENUE CORPORATION, ET AL.,
PETITIONERS

v.

FRANK ASSELTA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF ON BEHALF OF THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE

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Sec. 16 (b) — 2

730260—47——1

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In this case, as in *Walling* v. *Halliburton Oil Well Cementing Co.*, pending before this Court as No. 74, and *Walling* v. *The General Industries Co.*, pending before this Court as No. 564, the question is whether the method of compensation employed achieves compliance with the overtime requirements of Section 7 of the Fair Labor Standards Act. In the *Halliburton* case the employment contract specified hourly rates of pay and also contained a minimum weekly guaranty which was to be paid whenever the hours worked

per week did not exceed 84. In the *General Industries* case, the employees were paid a monthly salary for a regularly scheduled work-week, but the contract did not specify any hourly rates nor provide a method for computing them. In the instant case the agreement provided a weekly wage for a fixed number of hours of work and, without specifying hourly rates for those employed more than 40 hours per week, contained a formula by which they were to be determined. In each of the three cases the Administrator is of the opinion that the agreed weekly o monthly wage actually determines the compensation which the employees receive and, therefore, that the statutory regular rate should be calculated by dividing the weekly wage (or the monthly wage reduced to its weekly equivalent) by the number of hours for which it was paid in accordance with the rule announced in *Overnight Motor Co.* v. *Missel,* 316 U. S. 572, and followed in *Floyd* v. *Du Bois Soap Co.,* 317 U. S. 596, and *Warren-Bradshaw Drilling Co.* v. *Hall,* 317 U. S. 88. However, the combination of factors which demonstrate the controlling character of the weekly wage and the artificiality of the "regular" hourly rates urged by the employers is different in each case.

STATEMENT

This is an action under Section 16 (b) of the Act brought by maintenance employees in peti-

tioners' loft building to recover unpaid overtime compensation (R. 1–18).[1] Until April 20, 1942, respondents were employed under the so-called "Sloan Agreement" which provided for the payment of a minimum weekly wage of $25 for a scheduled workweek in excess of the statutory maximum and for the payment of overtime compensation at time and one-half for hours worked in excess of the scheduled workweek (Ex. 3, pp. 11–14, 2).[2] The Sloan Agreement expired on April 20, 1942, but a new agreement was not executed until September 1, 1942. The status quo was maintained pending negotiations, however, and the new agreement provided that its wage provisions would "take effect retroactively" to April 21 (Ex. 1, p. 12; Ex. 4, p. 6).

The new agreement[3] provided a regular workweek of 54 hours for watchmen, a regular work-

[1] Although the parties herein have employed in their briefs the symbol "R." to refer to folio numbers and the symbol "R. p." to refer to page numbers, this brief will adhere to the usual practice of using the symbol "R." for page references in the record. References to plaintiffs' exhibits in the Exhibit Volume are indicated by "Ex."

[2] Petitioners have paid the overtime compensation and have agreed to pay the liquidated damages for the period prior to April 20, 1942 (R. 72–73). This period is no longer involved in this action.

[3] Although captioned "National War Labor Board Agreement," it appears from the Directive Order of that Board that the Board expressly declined to write a contract for the parties although it understood that they desired to adopt the formula as to hours and wages incorporated in the agreement of September 1 (Ex. 4, pp. 3, 45, 47, 55–56).

week of 46 hours for other employees, and a minimum weekly wage of $27.50 (Ex. 1, pp. 25–28).[4] Most of the employees were paid the minimum weekly wage and received a wage increase of $1.40 per week in October 1943 (Ex. 6, pp. 36–103).[5] The agreement also contained a formula which provided that "the hourly rates for those regularly employed more than forty (40) hours per week shall be determined by dividing their weekly earnings by the number of hours employed plus one-half of the number of hours actually employed in excess of forty (40) hours" (Ex. 1, p. 27). An overtime rate of "at least time and one-half" the formula hourly rate was provided for the hours worked between 40 and 54 by watchmen and between 40 and 46 by other employees (Ex. 1, p. 29). An overtime rate of "double time" for hours in excess of 54 per week was provided for watchmen and of "time and three-quarters" for hours in excess of 46 per week for other employees (*Ibid.*). The rates for overtime after the scheduled work-week were intended to approximate time and one-half the average rate for the scheduled work-week (Ex. 4, p. 70).

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[4] The agreement set up different wage and hour schedules for apartment, office and loft buildings. It also set up different wage and hour schedules within those classifications for buildings of different size. Throughout this brief we refer only to the provisions which are applicable to petitioners' loft building.

[5] This increase was made retroactive to April 21, 1943 (Ex. 6, p. 97).

Although the new agreement provided that it would take effect September 1, 1942, and that the wage provisions would take effect retroactively to April 21, 1942, hourly rates for straight-time and overtime do not appear on the payroll records until September 20, 1942 (Ex. 6, pp. 36–103).[6] The hourly rates then shown were determined by dividing the weekly wage by the number of hours in the scheduled workweek plus one-half the number of hours in the scheduled workweek in excess of 40.[7] Frequently application of these rates did not result in the exact equivalent of the weekly wage (see *infra*, pp. 23–24). When this occurred the weekly wage was nevertheless paid. (R. 83, Ex. 6, pp. 36–103.)

The agreement contained several provisions under which employees would receive more than the formula straight-time rates for non-overtime hours. Per diem rates of pay were stated to be a proportionate amount of the weekly wage (Ex. 1, p. 32). Specific hourly rates for employees who regularly worked less than 40 hours were provided

[6] The weekly wage increase of $2.50 provided in the new agreement was paid retroactively to April 21, 1942, when the new agreement became effective (Ex. 6, p. 35). No other adjustments in compensation for the retroactive period were made.

[7] This method of computing hourly rates does not appear to conform to the contract formula which provides that the number of hours *actually* employed each week, rather than the *scheduled* number of hours, shall be used in determining the hourly rates (Ex. 1, p. 27).

which equalled the average hourly rate for regularly scheduled workweeks, not the lower rate computed according to the contract formula (Ex. 1, p. 28). Deductions for "excusable" absences were to be made at not more than formula straight-time rates, even though the absences were for overtime hours (Ex. 1, p. 29). This resulted in the payment of formula overtime rates for non-overtime hours and assured the payment of more than the average hourly rate paid in regularly scheduled workweeks.

The district court found as a fact that respondents "were employed by the defendants at fixed weekly rates of compensation" and that "the agreement formula for determining the hourly rates * * * did not correctly calculate or determine the true hourly rates of * * * employment" (R. 57). It therefore held that the regular rate should be determined in accordance with the rule laid down in *Overnight Motor Co.* v. *Missel, supra* (R. 66–67). The court of appeals held that "The effect of the use of the formula was to make any increase in the employees' pay above the regular weekly rate depend not upon overtime in excess of forty hours but upon overtime computed only in excess of whatever workweek the parties might agree upon" (R. 83). It further held that it negates "the statutory purposes to base employment upon a regular unvarying weekly wage for a workweek

in excess of the statutory minimum hours and then merely break that down into so-called regular and overtime hourly rates by means of a formula so the weekly wage actually definitely fixed is seemingly transferred into an hourly wage rate. That amounts but to an illusion of overtime pay" and the attempt to make the contract retroactive "but highlights the illusion that the new contract was more than a continuation of the old wage arrangement which did not comply with the statute." (R. 84.)

SUMMARY OF ARGUMENT

The validity of the compensation plan in the instant case depends upon the genuineness of the hourly rates employed by petitioners. *Walling* v. *Helmerich & Payne,* 323 U. S. 37; *Walling* v. *Harnischfeger Corp.,* 325 U. S. 427; *Walling* v. *Youngerman-Reynolds Hardwood Co.,* 325 U. S. 419. As we have seen, these hourly rates were not specified in the agreement, but a formula for their computation from the weekly wage was prescribed. Thus petitioners did not compute the hourly rate in the ordinary manner by dividing the weekly wage by the number of hours for which it was paid, 54 in the case of watchmen and 46 in the case of others (see *Overnight Motor Co.* v. *Missel, supra; Warren-Bradshaw Drilling Co.* v. *Hall, supra; Floyd* v. *Du Bois Soap Co., supra*), but by dividing by 61 in the case of watchmen

and 49 in the case of others. The failure to agree upon specific hourly rates and the artificial manner of their computation strongly indicate that the formula hourly rates were fictitious.[8] Cf. *Walling* v. *Helmerich & Payne, supra.* Of perhaps greater significance in demonstrating the artificiality of the formula rates, however, are the other provisions of the contract and the practices under it which refute petitioners' contention that the formula rates were actually applied and establish that the employees were in fact paid not the formula rates but the average hourly rate for the scheduled workweek. The features of the plan which negate the genuineness of the formula rates are as follows: (1) the hourly rate established for employees employed less than 40 hours a week was not the formula rate but the equivalent of the weekly wage divided by the number of hours in the scheduled workweek (54 in the case of watchmen, 46 in the case of others); (2) daily rates of pay were arrived at not by application of the formula rates but by dividing the applicable weekly wage by the normal number of days in the workweek; (3) employees employed for regular workweeks of 54 or 46 hours who

[8] As the district court stated: "The situation in *Walling* v. *Belo Corp.*, 316 U. S. 624, is clearly distinguishable since there the contracts provided for an hourly rate and not, as here, for a weekly rate to be reduced to an hourly rate by dividing it by hours in excess of those actually worked during the week." (R. 67.)

actually worked less than 40 hours because of "excusable" absences were paid at formula overtime rates for some of their non-overtime hours with the result that their actual rate of compensation approximated 1/54 or 1/46 of the weekly wage rather than the formula hourly rate; (4) the overtime rates of double time after 54 hours for watchmen and time and three-quarters after 46 for others were established to approximate one and one-half times the average hourly rate for the scheduled workweeks of 54 and 46 hours; (5) in regularly scheduled workweeks the weekly wage was paid even when application of the formula rates did not result in the exact equivalent of the weekly wage.

The above factors furnish convincing evidence that the weekly wage for a fixed workweek was the real measure of the employees' compensation, that the intention of the parties was to establish an actual rate of employment equivalent to the weekly wage divided by 54 or 46, the number of hours in the scheduled workweek, and that the formula for computing the hourly rates was merely a "mathematical manipulation" devised to enable petitioners to create "an illusion of overtime pay after a forty hour workweek" (opinion below, R. 84) and thus to avoid paying real overtime wages "unless there is overtime not only in excess of the statutory workweek but also in excess of the agreed work-

week" (opinion below, R. 84). Cf. *Walling* v. *Helmerich & Payne, supra,* at 40. In these circumstances the formula hourly rates are obviously unrealistic and the regular rates for statutory purposes should be computed by dividing the weekly wage by the number of hours in the scheduled workweek for which it was paid in accordance with the rule of the *Missel* case. This would give effect to the genuine regular rate contemplated by the agreement and require the payment of true overtime after 40 hours rather than after 54 or 46.

ARGUMENT

I

THE CONTRACT FORMULA PROVIDES AN ARTIFICIAL METHOD FOR COMPUTING HOURLY RATES

If the intention of the parties had been to agree upon hourly rates instead of a weekly wage it would have been a simple matter to express such an agreement in the contract. But, as the court below found "the parties did not see fit to agree upon the basis of a designated regular hourly rate of pay for a statutory workweek expressed simply in terms of dollars or cents but * * * attempted to bring the agreement within the statute by means of the formula above quoted." (R. 82.) The contract provided for a weekly wage for a scheduled workweek and further provided that hourly rates of pay for employees regularly employed more

than 40 hours a week were to be determined by dividing their weekly earnings by the number of hours employed plus one-half the number of hours actually employed in excess of 40.[9] Had the agreement contained only the weekly wage provisions, petitioners' compensation practices would have been in clear violation of the overtime requirements of the Act. *Overnight Motor Co.* v. *Missel,* 316 U. S. 572; *Floyd* v. *Du Bois Soap Co.,* 317 U. S. 596; *Warren-Bradshaw Drilling Co.* v. *Hall,* 317 U. S. 88. The first question, therefore, is whether the incorporation in the contract of the above "X-formula" for calculating hourly rates takes the instant case outside the scope of the *Missel* rule. It is the view of the Administrator that it does not.

The significance of the failure to specify hourly rates of employment where a weekly wage is agreed upon, even though there is an intention to have the weekly wage include overtime, is discussed in the Government's brief in *Walling* v. *The General Industries Co.,* No. 564, this Term, and will not be repeated here. We urge there that the failure of specification requires the conclusion that the actual basis of compensation is the

[9] This formula for computing the hourly rate of pay has generally become known as the "X-formula" in which "X" represents the variable hourly rate computed after the completion of each workweek. The weekly compensation for regular and overtime hours based on this rate will always be the exact equivalent of the predetermined weekly salary.

weekly wage and, therefore, that the regular rate is ascertained by application of the *Missel* formula. Although the X-formula in the contract here provides a means for determining hourly rates, we believe that rates determined in this manner are not genuine rates, particularly where the divisor of the weekly wage is stated to depend upon the hours actually worked, and that the weekly wage remains the only real basis of compensation. The rates derived from use of the formula have no independent significance in determining the employees' compensation because they fluctuate from week to week and are not known until the number of hours actually worked are known (opinion of district court, R. 66; *Castle* v. *Walling*, 153 F. 2d 923, 924 (C. C. A. 3)). The formula "serves only as a means of arriving at a figure for the regular rate which, together with the overtime rate, represents the weekly wage." *Walling* v. *Helmerich & Payne*, 138 F. 2d 705, 707 (C. C. A. 10). Since the X-formula rates are not in fact the rates at which employees are paid, they are not the regular rates to be used for computing statutory overtime. *Walling* v. *Helmerich & Payne*, 323 U. S. 37; *Walling* v. *Harnischfeger Corp.*, 325 U. S. 427; *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419.[10]

[10] The Circuit Court of Appeals for the Tenth Circuit in the *Helmerich* case held an X-formula invalid (138 F. 2d at 707) although it upheld the validity of the split-day plan subsequently held invalid by this Court.

The X-formula also frustrates the statutory policy of requiring the payment of additional compensation for hours worked in excess of the statutory workweek. It calculates "regular" and "overtime" hourly rates "so as to insure that the total wages for each tour [workweek here] would continue the same as under the original contracts, thereby avoiding the necessity of increasing wages or decreasing hours of work as the statutory minimum workweek of 40 hours became effective." *Walling* v. *Helmerich & Payne*, 323 U. S. at 38–39. Like the hourly rates calculated in the *Helmerich* case, the rates are "derived not from the actual hours and wages but from ingenious mathematical manipulations" (p. 41) for the purpose of perpetuating the prior compensation practices. While the question of the validity of the X-formula, as such, has not previously been presented to this Court, the rationale of the decisions of this Court so clearly demonstrates its artificiality that the lower courts have unhesitatingly and consistently rejected it. *Walling* v. *Helmerich & Payne*, 138 F. 2d 705 (C. C. A. 10); *Watkins* v. *Hudson Coal Co.*, 151 F. 2d 311 (C. C. A. 3), certiorari denied, 327 U. S. 777; *Castle* v. *Walling*, 153 F. 2d 923 (C. C. A. 5); see also *Patsy Oil & Gas Co.* v. *Roberts*, 132 F. 2d 826 (C. C. A. 10); *Seneca Coal & Coke Co.* v. *Lofton*, 136 F. 2d 359 (C. C. A. 10).

Under an X-formula plan the actual basis of compensation is obviously the weekly wage.

Therefore, as the district court held, since the parties "fixed a weekly wage by agreement, the determination of the regular rate became 'a matter of mathematical computation, the result of which is unaffected by any designation of a contrary "regular rate" in the wage contracts.' *Walling* v. *Hardwood Co.*, 325 U. S. 419, 425." (R. 66.) Just as the computation of the genuine regular rate in the *Helmerich* case "required only the simple process of dividing the wages received for each tour by the number of hours in that tour" (p. 40), so here, computation of the genuine regular rate requires only the simple process of dividing the salary received for the workweek by the number of hours for which it was paid in accordance with the rule of the *Missel* case, *supra*.

Although petitioners urge that the "contract hourly rates" fixed by the agreement were bona fide regular rates, they apparently did not compute the rates they used in accordance with the terms of the formula as it appears in the contract. Instead of dividing the weekly wage by the number of hours employed plus one-half the number of hours *actually* employed in excess of 40 hours, petitioners divided by the *scheduled* number of hours plus one-half the *scheduled* hours in excess of 40, namely, by 61 in the case of watchmen and 49 in the case of other employees (Petitioner's br. pp. 11–12). Without considering the effect of employing hourly rates calculated in a

manner not provided in the contract, it may be conceded that computation of the hourly rates in this method somewhat lessens their artificiality since they are known in advance once they have been computed. But this does not mean that they are bona fide rates of employment. The use of 61 or 49 as the divisor of the agreed weekly wage rather than the actual number of hours for which it was paid at once suggests a fictitious mode of calculation. Moreover, the statutory purposes are defeated even under the formula as applied by petitioners. As stated by the court below, "The effect of the use of the formula was to make any increase in the employees' pay above the regular weekly rate depend not upon overtime in excess of forty hours but upon overtime computed only in excess of whatever workweek the parties might agree upon. * * * The result was employment at whatever regular workweek and at whatever regular weekly wage the parties saw fit to agree upon which remained constant regardless of work in excess of forty hours per week which was not in excess of the number of hours in the agreed workweek." (R. 83.) Thus the formula even as applied by petitioners contains elements of artificiality. The invalidity of petitioners' method of compensation, however, is evidenced not only by the application of the formula but by other features of the plan which will be discussed in Point II.

II

OTHER FEATURES OF THE PLAN DEMONSTRATE THE ARTIFICIALITY OF THE FORMULA RATES AND THEIR PURPOSE TO AVOID THE PAYMENT OF OVERTIME COMPENSATION AS REQUIRED BY THE ACT

Provisions of the contract and petitioners' practices under it, in addition to the formula itself, demonstrate that the formula rates were artificially devised to avoid the payment of overtime compensation "unless there is overtime not only in excess of the statutory workweek but also in excess of the agreed workweek" (opinion below, R. 84). The fictitious character of the formula rates is illustrated by the fact that they were virtually never used and that other rates which directly reflected the weekly wage rate were in fact employed. In workweeks of scheduled hours the weekly wage was always paid even though the application of the formula rates frequently equalled a slightly different amount. In workweeks of less than the scheduled hours, the contract provisions ordinarily assured the payment of at least a pro rata share of the weekly wage although application of the formula rates would have equalled a lesser amount. In workweeks of more than scheduled hours, compensation for hours in excess of those scheduled was approximately the equivalent of one and one-half times the average weekly rate, the same as it had been before the present agreement became effective. In other words, petitioners attempted to substi-

tute the scheduled workweek of 54 or 46 hours for the 40-hour statutory workweek and, by the "mathematical manipulation" of the formula, sought to avoid the payment of real overtime until hours in excess of the scheduled week were worked while creating "an illusion of overtime pay after a forty hour workweek" (opinion below, R. 84). See *Walling* v. *Helmerich & Payne*, 323 U. S. at 41.

Petitioners' contention that the decision below "invalidates any wage plan fixing or guaranteeing compensation on a weekly or monthly basis for a regularly scheduled workweek exceeding forty hours"[11] (Brief, p. 24), plainly misconceives its effect. Such a plan may be valid where the hourly rates provided in the contract are in fact the rates which determine the employees' compensation. This Court has stated that the wage agreements in *Walling* v. *Belo Corp.*, 316 U. S. 624, "were upheld because it was felt that in fixing a rate of 67 cents an hour the contracts did in fact set the actual regular rate at which the workers were employed." *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, 426. Petitioners' difficulty is that the contract provisions and the practices under it conclusively indicate that the compensation scheme

[11] The question of the validity of a weekly or monthly guarantee for "an irregular workweek habitually exceeding forty hours per week" (Brief, p. 24) is now before the Court in *Walling* v. *Halliburton Oil Well Cementing Co.*, No. 74, and is not involved here.

was an evasive device and that the hourly rates shown on the books were not in fact the rates at which the workers were actually employed.

Perhaps the most striking illustration of the fact that the formula rates were artificial labels designed to preserve the 46- and 54-hour weeks without payment of statutory overtime is to be found in the specific hourly rates assigned in the contract to employees employed less than 40 hours per week. These rates were not the formula rates but were equal to 1/54 of the weekly wage for watchmen and 1/46 of the weekly wage for other employees. The agreement provided that employees other than watchmen would be paid a weekly minimum wage of $27.50 for 46 hours (Ex. 1, pp. 25, 27). The agreement also provided for a minimum hourly rate of 60 cents if the regular workweek was less than 40 hours (Ex. 1, p. 28). Dividing the weekly wage by 46, however, reveals that the average hourly rate for the 46-hour week was also 60 cents. Similarly, in the case of watchmen the agreement provided a minimum weekly wage of $27.50 for a regular 54-hour week and an hourly rate of 51 cents for a workweek of less than 40 hours (Ex. 1, pp. 25, 28). Dividing the weekly wage by 54 reveals that the average hourly rate for the 54-hour week was also 51 cents. The operation of these provisions is illustrated by the payments made to the two watchmen, McCole and Bilbow. Prior to the

agreement, McCole (who worked a five-day week) and Bilbow (who worked the other two days) received the same rate of pay (Ex. 6, pp. 13–32). After the agreement became effective, Bilbow was assigned an hourly rate of 51 cents as specified in the contract and McCole 45 cents as computed by the formula. That McCole was assigned a lower rate than his relief employee is explained by the fact that the hourly rate assigned McCole was not the genuine rate. Despite the different contract rates both continued to be paid at the same actual rate. McCole's salary, divided by his regularly scheduled hours, results in the same hourly rate of 51 cents as that paid Bilbow. Thus the obvious intent of the parties was to pay all watchmen 51 cents an hour for the first 54 hours of work and to pay all other employees 60 cents an hour for the first 46 hours of work. The formula rates were devised to permit this to be accomplished despite the overtime requirements of the Act.

Disregard of the formula rates and further evidence of the intention to pay at the average weekly wage rate for all hours under the scheduled workweek may also be found in the contract provision that "Per diem rates of pay of any employee shall be arrived at by dividing the applicable weekly wage by the normal number of days per week worked by that employee" (Ex. 1, p. 32). It is apparent that this

provision for daily rates of pay is inconsistent with the formula rates unless the daily wage is interpreted to include both straight-time and overtime pay. But even this interpretation of the daily wage would be deemed artificial under this Court's decision in *Walling* v. *Helmerich & Payne, supra.*

The contract provision relating to deductions for absences was but another means of avoiding the application of the formula rate and of paying not less than the average weekly rate regardless of the number of hours worked. The only clause in the contract relating to absences provides that deductions for "excusable" absences are to be made at not more than straight-time rates (Ex. 1, p. 29). In accordance with this provision, in workweeks of 40 hours or less it was petitioners' practice to pay for six hours of work at formula overtime rates although no overtime was worked. Thus if an employee worked 30 hours in a week, he was paid for 24 hours at straight-time rates and for 6 hours at overtime rates. The effect of this practice was to avoid payment at the low formula rates while attempting to maintain the fiction that they were actually in use.[12] The device of paying so-called overtime compensation for non-overtime hours in order to pay more than the stated hourly rate but to avoid the payment of overtime on

[12] The following tabulation of the payments made in four

the higher rate was condemned by this Court in *Walling* v. *Helmerich & Payne, supra.*[13]

workweeks involving excusable absences illustrates this point (Ex. 6, pp. 44, 48, 58, 102):

Employee	Weekly wage	Hours in scheduled workweek	Hours actually worked	Formula rate	Average rates for scheduled workweek	Average rate for hours actually worked
Anderson	$27.50	46	39	$0.561	$0.598	$0.604
Torra	30.50	46	32	.622	.663	.681
Peterson	27.50	46	30	.561	.598	.617
Santiago	28.90	46	40	.589	628	.634

It is at once apparent from the above tabulation that the effect of the method of making deductions at straight-time rates for excusable absences was to insure employees that they would receive considerably more than the formula rate and not less than a proportionate amount of the weekly wage rate.

[13] The intention to avoid a reduction in the average rate of pay is also apparent from the following provision contained in the section of the contract dealing with "Hours and Hourly Rates" (Ex. 1, p. 27): "No one regularly employed more than forty (40) hours per week shall have his regular working hours reduced by the employer in order to effect a corresponding reduction in pay." This provision also offends the statutory policy of reducing the hours of work to 40 by making those in excess of 40 more costly.

In some workweeks the assigned non-overtime, rather than the overtime, rates were paid presumably because the absences were considered not excusable. Since the contract is silent on how deductions are to be made for inexcusable absences, it cannot be ascertained whether deductions at the higher rate were intended as a penalty. In any event, the payment of the assigned non-overtime rates in a few instances does not, of course, render the plan less artificial in workweeks when different rates were paid or impugn the finding of the courts below that the formula rates were ineffective and that the true "regular rate" is that determined by dividing the weekly salary by the regularly scheduled hours.

The overtime rates paid by petitioners for hours in excess of 46 or 54 are equally revealing of the artificial character of the formula and of petitioners' purpose to pay real overtime compensation only for hours in excess of the scheduled workweek. Provision for a different overtime rate after the scheduled workweek from that employed after the statutory workweek itself suggests an artificially contrived arrangement. The explanation lies in the fact that the "overtime" rates for hours in excess of 46 and 54 were designed to approximate time and one-half the rate reached by dividing the salary by 46 or 54. This conformed with petitioners' prior agreement which required the payment of overtime after the scheduled workweek at time and one-half the regular rate (Ex. 3, pp. 11–14). As stated by the National War Labor Board, the provision for overtime at "time and three-quarters" after 46 hours was expressly made "in an effort approximately to equal the overtime to which an employee would ordinarily be entitled, if it were computed on the basis of time and a half after a forty-six (46) hour week" (Ex. 4, p. 70). The court below also recognized the intention to base genuine overtime upon the scheduled rather than the statutory workweek in its statement that the effect of the agreement was to make "[illegible]y increase in the employees pay above the weekly

rate depend not upon overtime in excess of forty hours but upon overtime computed only in excess of whatever workweek the parties might agree upon" (R. 83).

That the rates assigned on the pay rolls were fictitious is further demonstrated by an analysis of the pay rolls in the regularly scheduled workweeks, which constitute the normal pattern from which the "short" and "long" workweeks discussed above are exceptions.[14] The formula rates were constantly manipulated in an attempt to have them produce the agreed weekly wage. The manipulations occurred in a variety of ways: the overtime rate on the books was sometimes less than time and one-half the straight-time rate[15] and sometimes more;[16] the product of the straight-time rate and the straight-time hours was incorrectly entered;[17] the product of the overtime rate

[14] Over 70 percent of the workweeks of all the employees shown on petitioners' payrolls for this period were of the regularly scheduled length.

[15] For example, McCole was assigned a "regular" rate of $.48 and an "overtime" rate of only $.69; Torra was assigned a "regular" rate of $.65¼ and an overtime rate of $.96½ (Ex. 6, pp. 94–96, 98–103).

[16] For example, Anderson, Peterson, Del Rio and Manne were assigned a "regular" rate of $.561 and an "overtime" rate of $.843; Berger was assigned a "regular" rate of $.86½ and an "overtime" rate of $1.30 (Ex. 6, pp. 36–62).

[17] For example, the payrolls for Anderson, Del Rio and Manne show a "regular" rate of $.589 for 40 hours as equalling $23.59; the correct total is $23.56 (Ex. 6, pp. 94–96, 98–103).

and the overtime hours was incorrectly entered;[18] and the sum of straight-time compensation and overtime compensation was incorrectly stated.[19] In all instances the manipulations resulted in obtaining the predetermined weekly wage and in all regularly scheduled workweeks the agreed weekly wage was paid. As the court below stated, the use of the formula "involved mathematical computations which in most instances would, if the formula was strictly adhered to, not result in the exact weekly pay agreed upon. The slight discrepancies were then simply ignored and the agreed weekly rate was always paid instead of what would be due under the formula." (R. 83.) The discrepancies, although slight, reveal the clear intent to pay the salary and not the formula rates.

The true nature of petitioners' method of compensation is further apparent from a weekly sal-

[18] In the examples listed in the preceding footnote, the payrolls show an overtime rate of $.844 for 6 hours as equalling $5.31 instead of $5.30, the correct total. The sum of the "errors" ($23.59 plus $5.31) is $28.90, the agreed salary, instead of $28.86, the mathematically correct computation based on the assigned rates. On the same payrolls, McCole's "overtime" pay at $.69 for 14 hours was shown as $9.70, the correct total would be $9.66. Also on the same payrolls, Torra's "overtime" rate of $.965 for 6 hours is shown as totalling $5.80, instead of the correct figure, $5.79.

[19] For two weeks McCole's "regular" rate was shown as $.45, or $18.00 for 40 hours and $.676 for overtime or $9.46 for 14 hours. These figures were entered on the records and were added to total $27.50 (the then minimum) rather than $27.46. (Ex. 6, pp. 37, 38.)

ary increase of $1.40 granted on or about October 10, 1943, and made retroactive to April 21, 1943 (Ex. 6, pp. 94, 97). The pay roll record showing the retroactive increase reveals that it was on a weekly rather than an hourly basis and was paid irrespective of whether overtime was worked; thus, an employee who had worked 15⅓ weeks received 15⅓ times $1.40 (Ex. 6, p. 97). The same practice was followed when the $2.50 weekly increase provided in the agreement of September 1, 1942, was applied retroactively to April 1942.[20] Since the salary increase must be considered as part of the salary in applying the formula, it must be deemed to include both straight-time pay and overtime pay. The payment of a pro rata share of the increase for a fraction of a week again demonstrates that "overtime" pay was paid for non-overtime hours in order to maintain the same average hourly rate for all hours in the scheduled workweek.

Finally, the artificiality of the agreement of September 1, 1942, is clearly illustrated by the assumption that it could be made retroactive to April 20 by a mere statement to that effect without any pay adjustments based on the hourly rates of the new agreement. As we have seen,

[20] Thus one employee who had worked 1⅔ weeks during that period received 1⅔ times $2.50 and others received 19⅔ or 20⅚ times $2.50, a clear indication that the increase was viewed as a "straight-time" increase for each day of the week and included no extra compensation for overtime. (Ex. 6, p. 35.)

between April and September 1942 employees were paid under the terms of the Sloan Agreement with the understanding that the new agreement would be retroactively applied. The Sloan Agreement "merely fixed non-overtime wages for a fixed workweek of 47 hours [21] without any provision for overtime within the 47-hour workweek" (Petitioner's br., p. 11). Deductions were made for absences at the average hourly rate [22] and additional payment for hours in excess of 47 were supposed to be made at time and one-half this rate.[23] It is apparent that the hourly rates and the provisions for overtime under the two agreements are entirely dissimilar. Nevertheless, the only adjustment in compensation made pursuant to the provision requiring the retroactive application of the new agreement was the payment of the $2.50 weekly wage increase. The rate of pay which had been shown on petitioners' records as

[21] For the last four weeks of the period, beginning August 10, the hours were reduced to 46. The salary was not changed.

[22] The payroll for May 18–23, 1942 (Ex. 6, p. 17), indicates that employees who worked 39 and 42 hours were paid at $.53⅓ per hour, and that the wage for the scheduled week was $25.00 for 47 hours or $.53$^{9}/_{47}$ per hour. See also the payrolls for June 28–July 11, 1942 (Ex. 6, pp. 23, 24) where employees who worked only 4 out of 6 days were paid only ⅔ of their weekly wage.

[23] Actually in some weeks hours in excess of those scheduled were paid for at straight-time rates (payrolls for Torra and Del Rio, Ex. 6, p. 17) and in other weeks "overtime" was less than time and one-half the average rate (payrolls for Del Rio and Manne, Ex. 6, p. 23). In still other weeks time and one-half the average rate was paid (Ex. 6, pp. 24, 31).

the weekly wage remained unchanged; hourly rates were not recorded (Ex. 6, pp. 13–32). Thus petitioners apparently are of the view that, as long as the agreed salary is paid, the formula automatically makes all adjustments necessary to comply with the Act, for changes in the regular workweek, as well as for changes in salary.[24] As the court below observed, the argument that compliance was achieved by a mere statement that the agreement was retroactive "but highlights the illusion that the new contract was more than a continuation of the old wage arrangement which did not comply with the statute" (R. 84).

CONCLUSION

The holding of the courts below that the actual "regular rate" is the rate determined by dividing the salary by the regular number of hours for which it was paid, and is not the artificial, formula-derived rate shown on the pay rolls, is fully supported by the evidence. It therefore follows that the courts below correctly applied

[24] Petitioners' statement that "more was paid the employees than required by the agreement" (Brief, p. 10) is misleading. Even under petitioners' theory that the weekly wage included overtime, the argument is not made that it included overtime for hours in excess of the scheduled workweek. We have seen that some employees worked such overtime during the retroactive period and were paid additional compensation at varying rates ranging from straight-time to time and one-half. There is no explanation for the failure to pay compensation in addition to the $2.50 to employees who worked more than the scheduled hours (see n. 23, *supra*).

this Court's decisions in the *Helmerich, Harnischfeger* and *Youngerman-Reynolds* cases, *supra,* in holding that compliance with the Act was not achieved by payment of overtime based on the formula rates assigned on the pay rolls. The judgment of the circuit court of appeals should be affirmed.

Respectfully submitted.

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In the

Supreme Court of the United States

October Term, 1946

No. 497

149 Madison Avenue Corp. and Williams & Co. Inc.,
Petitioners,

against

Frank Asselta, Camilo Del Rio, Joseph McArdle, Samuel Manne, Cornelius McCole, Burton Peterson, Frank Rodriguez, James Torra, John H. Berger and George Berger,
Respondents.

PETITION FOR REHEARING

Walter Gordon Merritt,
Robert R. Bruce,
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PETITION FOR REHEARING

Your petitioners, 149 Madison Ave. Corp. and Williams & Co., Inc. respectfully pray for a rehearing of the order of this Court dated October 28, 1946, denying their petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Basic Facts

This is an action under the Fair Labor Standards Act for time and a half overtime and liquidated damages. All facts in the case were stipulated.

The collective bargaining agreement in our case provided for a regular workweek of 46 hours and weekly

compensation which included payment for the overtime hours in the regular workweek at rate of time and one half the hourly rate which was determined by the following formula:

> "The hourly rates for those regularly employed more than forty (40) hours per week shall be determined by dividing their weekly earnings by the number of hours employed plus one-half of the number of hours actually employed in excess of forty (40) hours."

The hourly rates so computed were actually set forth on the payrolls and acknowledged by the employees and were actually applied when the employees worked fewer hours or more hours than the scheduled workweek of 46 hours. There was no uncertainty or irregularity in applying the hourly rate. The only question seems to be the legality of the clause of the collective bargaining agreement which gives the method of computing the hourly rate instead of stating the hourly rate.

Argument

Petitioner assigns the following reason for granting this petition:

The decision of the Court below is in conflict with the decision of the Sixth Circuit Court of Appeals in Walling v. General Industries Co. (155 F. 2d 711), of which petitioners were not advised when their petition was filed and wherein this Court granted certiorari on November 12, 1946 (Docket No. 564).

If the monthly salary plan for a regularly scheduled workweek of 51 hours, upheld by the Sixth Circuit Court of Appeals in *Walling* v. *General Industries Co.*, 155 F. 2d 711, complies with Section 7 of the Fair Labor Stand-

ards Act then, inevitably, the weekly wage plan for a regularly scheduled workweek of 46 hours, as agreed upon by the Union and the employers association in our case, and approved by the National War Labor Board, must be valid.

The reasoning of the Sixth Circuit Court in deciding that the employer had compensated its employees for overtime in accordance with the Act is simple (p. 715):

> "* * * The salary of these men was formerly paid on an hourly basis. A change to a salary basis was negotiated between the union and the employer, the salary being calculated to include an allowance of time-and-one-half for overtime. * * * The pay was figured in a shift from hourly pay to monthly salary, at 80 cents an hour, which was the amount they would have earned at the regular hourly rate prior to February 1, 1941, plus overtime at the rate of time-and-one-half the regular hourly rate of pay for hours worked in excess of 40 for a scheduled work-week of 51 hours. It is not shown that any of these men ever worked more than eleven hours overtime each for the four weeks included in the monthly salary period, and for this time their salary includes an allowance of one-and-one-half pay for overtime * * *."*

Under the monthly salary plan, upheld in the *General Industries* case, there was no increase in the compensation paid monthly, unless the employees exceeded the scheduled workweek of 51 hours. Therein lies the essen-

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* Actually, an examination of the record in *General Industries*, shows the monthly salaries paid at the commencement of the arrangements were slightly less than would have been required by reference to the former rate of $.80 per hour. Later the salaries were adjusted to a higher monthly basis without reference to any hourly rate.

tial conflict* with the Second Circuit Court's opinion in our case, where the Court said (Record, p. 84):

> "* * * It does negate the statutory purposes to base employment upon a regular unvarying weekly wage for a workweek in excess of the statutory minimum hours and then merely break that down into so-called regular and overtime hourly rates by means of a formula so the weekly wage actually definitely fixed is seemingly transferred into an hourly wage rate. *That amounts but to an illusion of overtime*

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* Disregarding the formal difference between a monthly salary, inclusive of overtime, and a weekly wage, inclusive of overtime, the essential similarity between the questions presented by the petitions in the two cases emphasizes the conflict between Circuits.

In the *General Industries* case, Docket No. 564, the Administrator states the question as follows: "The employees in this case received flat monthly salaries under contracts of employment which did not specify regular or hourly rates of pay. * * * In the negotiations concerning the amount of the salary, consideration was given, *inter alia*, to the hourly rates previously paid. The question is whether the court below was justified in holding, notwithstanding the ruling of this Court in *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, that Section 7 of the Fair Labor Standards Act did not require that the employees receive compensation in addition to their salaries for hours worked in excess of the statutory maximum."

In our case, Docket No. 497, the question was stated as follows: "More broadly viewed, the question is whether under the Act employers and employees can ever effectively agree what the weekly earnings or 'take home' pay, inclusive of overtime, shall be for a regular workweek in excess of 40 hours, reducible by a clear formula to an hourly rate for the purpose of determining compensation when the hours worked are less than or more than the regular workweek; or whether the *Missel* formula ('Wage divided by hours equals regular rate', 316 U. S. 572, 580) is mandatory despite the contrary agreement and practice of the parties."

Differences in the facts, adverted to later in the text above, do not alter the fundamental conflict between Circuits. These differences—statement of the rate by formula and its translation to the weekly payrolls, plus the actual application of the formula rate where the hours exceeded or were less than the regular workweek—are points favorable to our case not present in the *General Industries* case.

pay after a forty hour workweek where there can be no increase in pay per workweek because of overtime work unless there is overtime not only in excess of the statutory workweek but also in excess of the agreed workweek * * *" (italics ours).

The test which the Second Circuit regards as critical is of no consequence under the Sixth Circuit's theory, if, in fact, the compensation agreed upon and paid for regularly scheduled workweeks in excess of the statutory workweek of 40 hours is sufficient to include compensation for the scheduled workweeks on the basis of time-and-one-half for overtime hours at the hourly rate paid when the salary was negotiated. The weekly salary paid under the National War Labor Board Agreement, in our case, meets this test. The agreement expressly provided that it should not be construed to lower the hourly rate presently received by any employee. It also provided that the overtime rate for hours exceeding 40 per week should be at least time-and-one-half the hourly rate. At the trial it was stipulated that the respondents "were employed and paid in accordance with the terms and conditions" of the Agreement.

Moreover, the Trial Court in our case found that the hourly rates derived from the formula were actually applied in "all situations" whether the employees worked less hours or more hours than the regularly scheduled workweek of 46 hours. Such hourly rates cannot be fictitious.

In this respect, the wage plan presented by our case conforms to general criteria recently laid down by this Court (see Point 3 of original petition), and goes beyond both the monthly salary plan presented by the *General Industries* case and the weekly salary plan presented by *Walling* v. *Halliburton Oil Well Cementing Co.* (Docket No. 74) now awaiting argument in this Court. In another

respect our case is more favorable than *General Industries* because the hourly rates, while not stated in the Agreement, were set forth in the payrolls after September 20, 1942 and acknowledged by the employees. It is difficult to believe that this Court which has so often refused to exalt form over substance would spell a difference between statement of the hourly rate in the agreement and statement of the formula for determining the rate when the calculation was actually made and translated to the payrolls.

When the petition for review was filed in this case on September 13th, petitioners' counsel were not cognizant of the Sixth Circuit Court's decision in the *General Industries* case. Their attention was directed to it shortly after the Administrator of the Wage and Hour Division filed his petition with this Court, on October 3, 1946.

At the Administrator's request, this Court has now granted review of two wage plans which necessarily involve the proper determination of the "regular rate" under Section 7 of the Act. Review of the *Halliburton* case was urged, notwithstanding the apparent governing precedent in *Walling* v. *Belo*, 316 U. S. 624, because of the different views of the Circuit Courts as to the effect of more recent decisions by this Court on the *Belo* doctrine. The *General Industries* case was urged on the ground of direct conflict with *Overnight Motor Co.* v. *Missel*, 316 U. S. 572. Our case is now presented for rehearing on the basis of a conflict between the Second and Sixth Circuits not heretofore known to exist, in addition to the grounds asserted in the original petition, which we believe to be meritorious.

Moreover, events since the denial of the petition on October 28, 1946 demonstrate that the predictions of a flood of litigation in the Federal and State Courts of New York were not unfounded. Formerly, the threat related primarily to suits attacking the validity of the so-called Meyer and National War Labor Board Agreements, which gov-

erned relations in the Building Service Industry in New York City between 1942 and 1945. Now the threat of litigation has been extended to certain classifications of employees under the so-called Frankenthaler Agreement, based upon an award by the Honorable George Frankenthaler, former State Supreme Court Justice, which governs labor relations in this field until 1948.

It would be difficult to exaggerate the necessity for a decision on the merits of the wage plan involved in the National War Labor Board and Meyer Agreements, and in part, in the Frankenthaler Agreement, as a means of avoiding constant litigation and relitigation of the same substantial question. This Court has often cautioned that its denial of a petition for certiorari is not to be construed as a decision on the merits. That being so, real estate employers who have now twice been subjected to substantial retroactive liabilities—first, because of mistake of law as to coverage—and now, apparently because of mistake as to what constitutes compliance with Section 7—will continue to resist countless double liability actions until the merits of the wage plan involved in their collective bargaining agreements have been finally adjudicated.

Conclusion

For the foregoing reasons, petitioners respectfully pray that the order of this Court denying their petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit be reheard and vacated and that the petition be granted.

Dated: November 21, 1946.

Walter Gordon Merritt,
Robert R. Bruce,
Counsel for Petitioners.

Counsel's Certificate

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

WALTER GORDON MERRITT,
ROBERT R. BRUCE,
Counsel for Petitioners.

In the

Supreme Court of the United States

October Term, 1946

No. 497

149 Madison Avenue Corp. and Williams & Co., Inc.,

Petitioners.

against

Frank Asselta, Camilo Del Rio, Joseph McArdle, Samuel Manne, Cornelius McCole, Burton Peterson, Frank Rodriguez, James Torra, John H. Berger and George Berger,

Respondents.

MOTION BY PETITIONERS TO MODIFY JUDGMENT AND MEMORANDUM IN SUPPORT THEREOF

Walter Gordon Merritt,
Robert R. Bruce,
Counsel for Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 497

149 MADISON AVENUE CORP. and WILLIAMS & CO., INC.,

Petitioners,

against

FRANK ASSELTA, CAMILO DEL RIO, JOSEPH MCARDLE, SAMUEL MANNE, CORNELIUS MCCOLE, BURTON PETERSON, FRANK RODRIGUEZ, JAMES TORRA, JOHN H. BERGER and GEORGE BERGER,

Respondents.

MOTION BY PETITIONERS TO MODIFY JUDGMENT

Petitioners, 149 MADISON AVENUE CORP. and WILLIAMS & CO., INC., respectfully move this Court to modify its judgment herein by remanding this case to the District Court for the Southern District of New York with directions to that Court to permit petitioners to plead and prove under Sections 9 and 11 of the Portal-to-Portal Act of 1947 and to withhold the entry of final judgment on the mandate of this Court pending and subject to the trial of any issues raised under said sections; or, in the alternative, that this Court, if so advised, rehear the case in the light of the defenses now afforded by said Sections 9 and 11.

It is also respectfully moved that this Court stay issuance of its mandate pending disposition of this motion.

Dated: May 28, 1947.

WALTER GORDON MERRITT,
ROBERT R. BRUCE,
Counsel for Petitioners.

Memorandum in Support of Motion

In its opinion filed May 5, 1947 this Court held that the District Court and the Circuit Court of Appeals properly determined that the wage agreement in question, known as the National War Labor Board Agreement, failed to satisfy the requirements of Section 7(a) of the Fair Labor Standards Act of 1938.

On May 14, 1947 there was enacted the Portal-to-Portal Act of 1947. Sections 9 and 11 of that Act, set forth in the Appendix together with Section 1 containing the Congressional "Findings and Policy", substantially changed the law governing liability and the amount of recovery in pending actions under the Fair Labor Standards Act of 1938.

In substance Section 9 provides that no employer shall be liable on account of his failure to pay wages in accordance with the Fair Labor Standards Act "if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged." Section 11 provides that if the employer "shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 16(b) of such Act."

This action was "commenced prior to" the Portal-to-Portal Act and is still within the jurisdiction of this Court.

Sections 9 and 11 of the Portal-to-Portal Act are remedial and apply to pending actions. Petitioners are entitled to the benefit of the changed law. *Carpenter* v. *Wabash Ry. Co.*, 309 U. S. 23, 27; *American Foundries* v. *Tri-City Council*, 257 U. S. 184, 201; *Dinsmore* v. *Southern Express Co.*, 183 U. S. 115; *Watts, Watts & Co.* v. *Unione Austriaca*, 248 U. S. 9, 21.

Petitioners merely seek an opportunity to present their defenses under Sections 9 and 11. While evidence exists in the present case to support said defenses, there is additional evidence available for presentation to the District Court relating thereto. Petitioners believe the fullest opportunity for such defenses and the most appropriate method of carrying out the Congressional mandate, lies in the remand of this case to the District Court with appropriate instructions.

Reflecting the merits of petitioners' motion, petitioners acted in accordance with the wage agreement whose terms were recommended by Directive Order of the National War Labor Board, as acknowledged by this Court in its opinion (R. p. 40, Pl. Ex. 4). Moreover, in the lower court near the close of the case, the trial judge said:

> "I got the impression at the trial from Mr. Hauer that the employers mean to do what is right by their employees (S. M. 488).
>
> • • • • •
>
> "There is no evidence by the way in which they got the result they meant to circumvent the law. I mean, it is quite the contrary, because they got the contract through the War Labor Board (S. M. 489).
>
> • • • • •
>
> "My impression, so far as I have gotten it, was that these people and the War Labor Board and the Real Estate Board and all, each according to its

lights and the state of the law at the time, did something which they thought they had a right to do and therefore you can't say they were deliberate cheaters of labor" (S. M. 494).

These references from the trial minutes were not included in the transcript of record in the Circuit Court or in this Court because under the then existing law petitioners' good faith was wholly immaterial. *Overnight Motor Co.* v. *Missel*, 316 U. S. 572; *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697.

Modification of the judgment of this Court, as suggested in this motion, is necessary to effectuate the will of Congress and in the interest of substantial justice.

Respectfully submitted,

WALTER GORDON MERRITT,
ROBERT R. BRUCE,
Counsel for Petitioners.

Counsel's Certificate

We hereby certify that the foregoing motion to modify the judgment is presented in good faith and not for delay.

WALTER GORDON MERRITT,
ROBERT R. BRUCE,
Counsel for Petitioners.

Appendix

Part I

Findings and Policy

Section 1. (a) The Congress hereby finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the results that, if said Act as so interpreted or claims arising under such interpretations were permitted to stand, (1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment, and the earning power of employees; (2) the credit of many employers would be seriously impaired; (3) there would be created both an extended and continuous uncertainty on the part of industry, both employer and employee, as to the financial condition of productive establishments and a gross inequality of competitive conditions between employers and between industries; (4) employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay; (5) there would occur the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in; (6) voluntary collective bargaining would be interfered with and industrial disputes between employees and employers and between employees and employees would be created; (7) the courts of the country would

be burdened with excessive and needless litigation and champertous practices would be encouraged; (8) the Public Treasury would be deprived of large sums of revenues and public finances would be seriously deranged by claims against the Public Treasury for refunds of taxes already paid; (9) the cost to the Government of goods and services heretofore and hereafter purchased by its various departments and agencies would be unreasonably increased and the Public Treasury would be seriously affected by consequent increased cost of war contracts; and (10) serious and adverse effects upon the revenues of Federal, State, and local governments would occur.

The Congress further finds that all of the foregoing constitutes a substantial burden on commerce and a substantial obstruction to the free flow of goods in commerce.

The Congress, therefore, further finds and declares that it is in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this Act be enacted.

The Congress further finds that the varying and extended periods of time for which, under the laws of the several States, potential retroactive liability may be imposed upon employers, have given and will give rise to great difficulties in the sound, and orderly conduct of business and industry.

The Congress further finds and declares that all of the results which have arisen or may arise under the Fair Labor Standards Act of 1938, as amended, as aforesaid, may (except as to liability for liquidated damages) arise with respect to the Walsh-Healey and Bacon-Davis Acts and that it is, therefore, in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that

this Act shall apply to the Walsh-Healey Act and the Bacon-Davis Act.

(b) It is hereby declared to be the policy of the Congress in order to meet the existing emergency and to correct existing evils (1) to relieve and protect interstate commerce from practices which burden and obstruct it; (2) to protect the right of collective bargaining; and (3) to define and limit the jurisdiction of the courts.

* * * *

SEC. 9. RELIANCE ON PAST ADMINISTRATIVE RULINGS, ETC. —In any action or proceeding commenced prior to or on or after the date of the enactment of this Act based on any act or omission prior to the date of the enactment of this Act, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

* * * *

Sec. 11. LIQUIDATED DAMAGES.—In any action commenced prior to or on or after the date of the enactment of this Act to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court m , in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 16 (b) of such Act.

SUPREME COURT OF THE UNITED STATES

No. 497.—October Term, 1946.

149 Madison Avenue Corporation, and Williams & Co., Incorporated, Petitioners, *v.* Frank Asselta, Camilo Del Rio, Joseph McArdle, et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[May 5, 1947.]

Mr. Chief Justice Vinson delivered the opinion of the Court.

This employee suit was brought in the District Court to recover overtime compensation, liquidated damages, and a reasonable attorney's fee pursuant to §§ 7 (a) and 16 (b) of the Fair Labor Standards Act of 1938.[1] Recovery was allowed in the District Court, and that judgment was affirmed in the Circuit Court of Appeals. We granted certiorari to consider the important questions presented

[1] 52 Stat. 1060, 29 U. S. C. § 201 *et seq.* Insofar as pertinent, § 7 (a) provides:

"No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

. . . .

"(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

Section 16 (b) provides in part:

"Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. . . ."

relating to the application of the overtime provisions of the above-mentioned statute.

Respondents are service and maintenance employees who, during the period in question, worked in a loft building owned by petitioner 149 Madison Avenue Corporation and managed by petitioner Williams & Co. It has been stipulated that respondents were engaged in the production of goods for commerce.[2] We are here concerned with the period of employment extending from April 21, 1942, to December 10, 1943.

Prior to April 21, 1942, employment relations between the petitioners and respondents were governed by a collective wage agreement, known as the Sloan Agreement.[3] According to its terms, employees were paid flat weekly wages for workweeks of specified length which, in the case of most of the respondents, amounted to $25 for 47 hours of weekly employment. No hourly rates were specified, nor was any attempt made to compensate employees at the rate of time and one-half for hours worked in excess of 40 in any week.

As the expiration date of the Sloan Agreement drew near, negotiations between the interested parties were initiated for the purpose of reaching agreement on a new contract. After preliminary conferences proved fruitless, the case was certified to the War Labor Board. That agency stated its recommendations in a directive order

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[2] Petitioners have raised no objection as to the amount of the recovery allowed the respondents by the District Court if it be assumed that the lower courts otherwise correctly determined their liability.

[3] The Sloan Agreement was negotiated between the Realty Advisory Board on Labor Relations, Incorporated, as agent for various owners of loft, office and apartment buildings located in the Borough of Manhattan in the City of New York, and Local 32-B of the Building Service Employees International Union on behalf of its members. The same parties negotiated the agreement in question.

issued July 29, 1942; and on September 1, 1942, the parties entered into the agreement in question, known as the National War Labor Board Agreement. It had been agreed that the terms of the new contract were to be made retroactive to April 20, 1942, the expiration date of the Sloan agreement.

The new contract provided for a workweek of 54 hours applicable to watchmen and a workweek of 46 hours for other regular employees. Weekly wages were established to compensate the 54 or 46 hours of labor which sums were stated to include both payments for the regular hours of employment and time and one-half for the hours in excess of 40. To derive the hourly rate from the weekly wage, the following formula was included:

"The hourly rates for those regularly employed more than forty (40) hours per week shall be determined by dividing their weekly earnings by the number of hours employed plus one-half of the number of hours actually employed in excess of forty (40) hours."

Although a literal reading of the above language might seem to indicate the establishment of a variable hourly rate dependent upon the number of hours actually worked in any given week, such was not the practical construction of the parties. Instead of making use of the number of hours actually worked, only the hours the employee was scheduled to work and the weekly wage for such scheduled workweek entered into the calculation of the non-overtime hourly rate.[4] The hourly rate as derived from the formula remained constant, therefore, regardless of whether the

[4] In case of an employee hired for a regular 46 hour week at a weekly wage of $27.50, the "hourly rate" was derived from the formula by means of the following calculation: $27.50 ÷ [46 + ½(46 − 40)] = $.561 per hour. In effect, the formula rate is obtained, not by dividing the weekly wage by 46, the number of hours scheduled to be worked, but by dividing that sum by 49, a divisor determined by the formula. In the case of a watchman hired for a 54 hour week at the same weekly wage, the formula rate was determined by this calculation: $27.50 ÷ [54 + ½(54 − 40)] = $.4508 per hour.

employee worked the scheduled number of hours during the week or a greater or lesser number. In effect, the agreement instead of directly stating a fixed hourly rate in terms of a stipulated amount per hour provided a formula whereby such a fixed hourly rate could be calculated.

Under the agreement, weekly compensation varied according to the number of hours worked in that week. Thus, in case an employee was unable to work all his scheduled hours due to an "excusable cause," he was paid at the formula rate with the provision, however, that six of the hours worked should be compensated as overtime regardless of whether the total of hours actually worked was greater or less than 40 in that week. If the employee's absence was not excusable, he was apparently paid a sum for the week obtained by multiplying the number of hours actually worked times the formula rate, being given credit for overtime only in case the number of hours worked exceeded 40.[5] The agreement provided that all regular employees except watchmen should be compensated at a rate one and three-quarters times the hourly rate derived from the formula for hours worked in excess of 46. Watchmen were to be paid twice the formula rate for hours worked in excess of 54. Part-time workers employed for less than the scheduled workweek were hired at a specified schedule of hourly rates obtained by dividing the weekly wage paid the regular employees by the number of hours in the regular workweek.

It was not the purpose of Congress in enacting the Fair Labor Standards Act to impose upon the almost infinite variety of employment situations a single, rigid form of wage agreement. *Walling* v. *Belo Corp.*, 316 U. S. 624 (1942). Section 7 (a) of the Act requires, however, that any wage agreement falling within its purview must es-

[5] The agreement made no specific provision for situations involving unexcused absences. The above-described procedure seems to have been applied in practice, however.

tablish an hourly "regular rate" not less than the statutory minimum and provide for overtime payments of at least one and one-half times the "regular rate." A wage plan is not rendered invalid simply because instead of stating directly an hourly rate of pay in an amount consistent with the statutory requirements, the parties have seen fit to stipulate a weekly wage inclusive of regular and overtime compensation for a workweek in excess of 40 hours and have provided a formula whereby the appropriate hourly rate may be derived therefrom. The crucial questions in this case, however, are whether the hourly rate derived from the formula here presented was, in fact, the "regular rate" of pay within the statutory meaning and whether the wage agreement under consideration, in fact, made adequate provision for overtime compensation.

We have held that the words "regular rate," while not expressly defined in the statute, ". . . mean the hourly rate actually paid for the normal, non-overtime workweek." *Walling* v. *Helmerich & Payne, Inc.*, 323 U. S. 37, 40 (1944). The regular rate is thus an "actual fact," and in testing the validity of a wage agreement under the Act the courts are required to look beyond that which the parties have purported to do. *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, 424 (1945). It is the contention of the respondents that the rate derived by the use of the contract formula was not the regular rate of pay; that the regular rate actually paid was substantially that obtained by dividing the weekly wage payable for the working of the scheduled workweek by the number of hours in such scheduled workweek; and that consequently, the plan made no adequate provision for overtime compensation until employees regularly hired as watchmen had worked a total of 54 hours in one week and until other regular employees had worked a total of 46 hours. We believe that the record provides ample support for that view.

Thus, in determining a schedule of hourly rates payable to part-time workers employed less than 40 hours a week, no use whatsoever was made of the hourly rate derived from the formula. Part-time workers were paid a rate determined by dividing the weekly wage paid to the regular employees by the number of hours in the regular workweek despite the fact that, according to the terms of the formula, the weekly wage included both regular and overtime pay. Insofar as part-time workers were concerned, the agreement clearly indicated an intention to compensate an hour's labor by payment of a pro-rata share of the weekly wage.

Nor was there consistent application of the hourly rate as determined by the formula to the work of regular employees hired for a full 46 hour week. Where such an employee was absent for an "excusable cause," his weekly compensation was not determined by multiplying the formula rate by the hours worked. Rather, six of the hours the employee worked were always treated as overtime and compensated at the rate of one and one-half times the formula rate regardless of the total hours actually worked, thus resulting in average hourly compensation considerably in excess of the formula rate. The payment of "overtime" compensation for non-overtime work raises strong doubt as to the integrity of the hourly rate upon the basis of which the "overtime" compensation is calculated. Cf. *Walling* v. *Helmerich & Payne, Inc., supra.* While the average hourly rate actually received by the employee in this situation was not precisely that which would have resulted from dividing the weekly wage by 46, it ordinarily approached that figure much more closely than it did the so-called hourly rate established by the formula.[6] This method of payment reveals further evi-

[6] Thus the employee Anderson worked only 39 hours in the week of Feb. 14, 1943, the 7 hours of absence apparently being due to an "excusable cause." Under the agreement, which would entitle him to six hours of "overtime" pay, he should have received weekly compensation in the amount of $23.56. The actual average hourly rate

dence of an attempt to pay a pro-rata share of the weekly wage for an hour's labor regardless of the number of hours worked up to 46.

The agreement provided that hours worked in excess of the scheduled 46 hour week should be compensated at the rate of one and three-quarters of the formula rate.[7] While the formula rate seems to have been consistently applied in such situations, it is significant to observe that the amount received by the worker under these circumstances approximates very closely that which he would have received had he been paid an hourly rate determined by dividing the weekly wage payable for the scheduled workweek by 46 with payment of time and one-half for hours worked in excess of 46.[8] This approximation was not fortuitous. In the directive order of the National War Labor Board the origin and purpose of these provi-

during that week accordingly would be $.604. If Anderson had been paid on an hourly basis determined by dividing the weekly wage paid for a scheduled workweek by the number of hours in such workweek, he would have received $.598, whereas, had he been paid the straight formula rate he would have received $.561 per hour. So also, the petitioner Peterson in the week of Dec. 13, 1942, was absent 16 hours for excusable causes. The payroll records reveal he earned $18.50 or an actual average hourly rate of $.617 as compared to $.598, the average rate for a scheduled workweek, and to $.561, the formula rate.

[7] In the case of watchmen, who were assigned a scheduled week of 54 hours, twice the formula rate was paid for hours worked in excess of 54.

[8] Thus if an employee hired for a regular workweek of 46 hours at $27.50 worked 50 hours in one week, his total weekly compensation would amount to $31.43 if compensated in accordance with the terms of the agreement. If, instead, the employee were hired on a straight weekly basis at the same weekly wage with provision for time and one-half the average hourly rate, for hours worked in excess of 46, he would receive $31.09 as total weekly compensation for 50 hours of work. If a watchman, scheduled to work a 54 hour week at $27.50 actually worked 58 hours he would receive $31.11 weekly compensation if calculated according to the agreement, or $30.55 if calculated on a straight weekly basis with time and one-half for hours worked in excess of 54.

sions are discussed, and the following statement is made: "Overtime over forty-six (46) hours is paid at a rate of time and three-quarters in an effort approximately to equal *the overtime to which an employee would ordinarily be entitled, if it were computed on the basis of time and a half over a forty-six (46) hour week.*" [9]

Petitioners have argued that none of these provisions provides a conclusive demonstration that the formula rate was not the actual regular rate of pay. It is said that part-time employees were paid a pro-rata hourly rate since they had no opportunity to earn overtime compensation; that the method of paying regular employees in case of excusable absences was merely a laudable effort on the part of the employer to compensate more fully than the Act requires when an employee failed to work his scheduled week because of illness or like causes; and that the time and three-quarters provision represented an additional premium for employees called upon to work hours substantially in excess of the non-overtime week. We cannot ignore the fact, however, that the agreement on its face fails to provide for the consistent application of the formula rates in those situations where such rates should be expected to control. These deviations take on additional significance when it is observed that in every situation, with the relatively unimportant exception of that involving unexcused absences,[10] the amount paid was either precisely or substantially that which employees

[9] (Emphasis supplied.) The agreement in question also contained the following provision: "Per diem rates of pay of any employee shall be arrived at by dividing the applicable weekly wage by the normal number of days per week worked by that employee in the building in question." This provision is obviously at odds with the statement in the agreement that the weekly wage stipulated for a scheduled workweek included both regular pay and overtime for hours worked over 40. There is nothing in the record, however, to indicate that the per diem provisions were actually applied. Petitioner explains its presence in the agreement as an inadvertent hold-over from the earlier Sloan Agreement.

[10] See note 5 *supra*.

would have been paid had the contract called for employment on a straight 46 hour week with payment of time and one-half only for hours worked in excess of 46.

Further light is thrown upon the nature of the wage agreement by a consideration of the plan in actual operation. During the period between April 21 and September 1, 1942, when the contract in question was the subject of negotiation, it was understood that the old Sloan Agreement should remain in effect but that the terms of the new contract should be given retroactive application to April 20. The Sloan Agreement provided for a minimum wage of $25 for a workweek of 47 hours with no provision for overtime for hours worked in excess of 40. It is obvious, therefore, that between the above-mentioned dates the employees were paid on a basis clearly repugnant to the requirements of § 7 (a) of the Fair Labor Standards Act. Petitioners urge, however, that by making the retroactive payments as required by the agreement, any illegality in the method of payment during the period of negotiations was eliminated. But in attempting to satisfy the retroactive liability, petitioners completely ignored the formula rates and paid each of the respondents $2.50 for each week worked during the period, representing the increase in the minimum weekly wage for the scheduled workweek established by the new agreement, without attempting further adjustment. Petitioners admit that "Undoubtedly some employees who worked no overtime in certain weeks were overpaid; other who worked beyond the scheduled workweek of 47 hours then prevailing may not have been paid enough." It is apparent that the amount of wages paid the respondents for work performed during the period of negotiations was in no sense determined by application of hourly rates derived from the formula.[11]

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[11] A somewhat similar situation prevailed with respect to an increase of $1.40 in the weekly wage granted on October 10, 1943, and made retroactive to April 21, 1943. It appears that petitioners

The parties have called our attention to much other evidence which, it is asserted, reveals the practical construction given to the terms of the agreement in question. We do not feel that it is necessary to review these matters at length. It is sufficient to state that, after considering the terms of the agreement and the operation of the plan in actual practice, we have come to the conclusion that the agreement in this case was one calling for a workweek in excess of 40 hours without effective provision for overtime pay until the employees had completed the scheduled workweek and that the "hourly rate" derived from the use of the contract formula was not the "regular rate" of pay within the meaning of the Fair Labor Standards Act. This is not a case like *Walling* v. *Belo Corp., supra,* or *Walling* v. *Halliburton Oil Well Cementing Co.,* — U. S. — (1947). Unlike those cases there was here no provision for a guaranteed weekly wage with a stipulation of an hourly rate which under the circumstances presented could properly be regarded as the actual regular rate of pay.

We hold for the reasons stated above that the District Court and the Circuit Court of Appeals properly determined that the wage agreement in question failed to satisfy the statutory requirements. *Walling* v. *Helmerich & Payne, Inc., supra; Walling* v. *Youngerman-Reynolds Hardwood Co., supra; Walling* v. *Harnischfeger Corp.,* 325 U. S. 427 (1945).

Affirmed.

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made some effort to make adjustments consistent with the formula in payment to employees who had worked hours in excess of the scheduled workweek. It is conceded, however, that no such adjustments were made with respect to those who worked less than their scheduled hours in weeks during the retroactive period, such employees being paid the full weekly increase for each week employed regardless of hours actually worked.